Supreme Court of the United States

OCTOBER TERM, 1962

No. 732

ROBERT C. BROOKS, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

No. LR-60-C-124

ROBERT C. BROOKS, PLAINTIFF

vs.

MISSOURI PACIFIC RAILROAD COMPANY, DEFENDANT

COMPLAINT—filed September 20, 1960

I.

The jurisdiction of this court is based upon the provisions of Section 9(d) of the Universal Military Training and Service Act, as amended (Act of June 19, 1951, c. 144, Sec. 9, U.S. Stat. 86; U.S.C. Title 50 (App.), Sec. 459).

II.

Plaintiff, Robert C. Brooks, brings this action seeking adjustment of his seniority as a journeyman mechanic at North Little Rock, Arkansas, and for such other relief as the court may find him entitled to.

III.

Defendant is now engaged and at all times material hereto was engaged, in the business of a common carrier, with a place of business in the city of North Little Rock, Pulaski County, Arkansas.

IV.

Plaintiff, Robert C. Brooks, was originally hired by defendant as an apprentice machinist at Monroe, Louisiana, on July 5, 1951. He left this position to enter military service on or about January 24, 1952, and entered military service on February 1, 1952, and was honorably discharged therefrom on November 7, 1953. Plaintiff pos-

sesses a certificate of satisfactory performance of military service and applied for reinstatement and was reinstated by the defendant as an apprentice machinist at Monroe, Louisiana, on November 23, 1953.

[fol. 2] V.

A collective bargaining agreement effective September 1, 1949, between defendant and System Federation No. 2, Railway Employees' Department, American Federation of Labor, governs apprentice mechanics, positions which plaintiff left to enter military service. Such apprentice machinist positions were also governed by a memorandum of agreement between defendant and System Federation No. 2, dated December 4, 1945, which was designed to protect the seniority of employees during military and naval service. Apprentice machinists' positions were further governed by an agreement between defendant and System Federation No. 2, dated January 12, 1956, effective January 1, 1956, revising Rule 37(e) of the September 1, 1949 agreement.

VI.

Following his military service and reinstatement by defendant at Monroe, Louisiana, on November 23, 1953, plaintiff resumed his employment under the Apprentice Machinist Training Program at Monroe, Louisiana, until April 29, 1954, when he was reached by reduction in force and laid off in seniority order. Plaintiff continued in layoff status at Monroe, Louisiana, until July 6, 1954, when he answered a system call for apprentice mechanics at the St. Louis, Missouri, shops of defendant. Plaintiff continued his training under the Apprentice Machinist Training Program at St. Louis, Missouri, until on or about July 25, 1955, when he was approved for transfer from the St. Louis, Missouri, shops to the North Little Rock, Arkansas, shops of defendant as an apprentice machinist. Plaintiff continued under the Apprentice Machinist Training Program at North Little Rock, Arkansas, at that level to which he had advanced as a result of his employment at both Monroe, Louisiana, and St. Louis, Missouri, completing his apprentice machinist training on January 23,

1958, and was immediately employed thereafter as a journeyman machinist.

[fol. 3]

VII.

Following completion by plaintiff of the Apprentice Machinist Training Program on January 23, 1958, defendant assigned plaintiff a seniority date as a journeyman machinist at North Little Rock, Arkansas, to coincide with the date of completion of the Apprentice Machinist Training Program, and the first day of employment as a journeyman machinist.

VIII.

Plaintiff immediately protested to defendant the assigned journeyman machinist seniority date at North Little Rock, Arkansas, on the grounds that such seniority date was incorrect under the terms of the applicable collective bargaining agreement and under the rationale of the Veterans' Re-employment Statute. Thereafter, defendant agreed to assign plaintiff a retroactive journeyman seniority date at Monroe, Louisiana, the point at which he entered into his apprentice machinist training, allegedly in accordance with applicable collective bargaining agreements and memoranda of understanding between defendant and System Federation No. 2.

IX.

Defendant has refused and still refuses to assign plaintiff that retroactive seniority date as journeyman machinist, which plaintiff would have attained had he not been absent in military service and as a consequence thereof plaintiff has been placed in the position on the seniority roster at North Little Rock, Arkansas, at a point lower to that to which he feels he is entitled, both under the applicable collective bargaining agreement and the Universal Military Training and Service Act, and is thereby subject to premature lay-offs, opportunities and advantages of employment which he otherwise might attain.

Wherefore, plaintiff prays judgment of this court that he be assigned that retroactive seniority date as a jour-

neyman machinist at North Little Rock, Arkansas, to [fol. 4] which he is entitled, and for such other and further relief as the court may find him entitled to.

/s/ Osro Cobb,
United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

MOTION TO DISMISS AND ANSWER OF DEFENDANT— filed November 1, 1960

Comes the defendant, Missouri Pacific Railroad Company, and for its motion to dismiss and answer states as follows:

The defendant moves to dismiss the complaint on the basis that the Court does not have jurisdiction of the subject matter in that the complaint calls for an interpretation of a Collective Bargaining Agreement, the exclusive jurisdiction of which question is vested in the National Railroad Adjustment Board under the Railway Labor Act, and on the ground that the complaint fails to state a claim upon which relief can be granted.

1.

Admits that the provisions of Section 9(d) of the Universal Military Training and Service Act, as amended, conferred jurisdiction upon the United States Courts in a proper case, but denies that in view of the subject matter of this complaint this court has jurisdiction.

2.

Admits the allegations of paragraph 2 of the complaint but denies that the plaintiff is entitled to any relief.

3.

Admits the allegations of paragraph 3 of the complaint.

[fol. 5]

4.

Admits the allegations of paragraph 4 of the complaint.

5.

Admits that there is in existence a Collective Bargaining Agreement between the defendant and System Federation No. 2, Railway Employees' Department, American Federation of Labor, effective September 1, 1949; admits that there is in existence a memorandum of agreement between defendant and said System Federation No. 2 dated December 4, 1945; admits that there is in existence an agreement between defendant and said System Federation No. 2 dated January 12, 1956 (or January 11, 1956), effective January 1, 1956, revising Rule 37(e) of the said September 1, 1949, agreement; and alleges that said agreements speak for themselves.

6.

Admits the allegations of paragraph 6 of the complaint.

7.

Admits the allegations of paragraph 7 of the complaint.

8.

Admits that the plaintiff protested to the defendant the assigned journeyman machinist seniority date at North Little Rock, Arkansas, on the grounds that such seniority date was incorrect and admits that the defendant has agreed and does agree to assign plaintiff a retroactive journeyman seniority date at Monroe, Louisiana, the point at which he entered into his apprentice machinist training, and alleges that in so doing the defendant has acted in accordance with the provisions of the applicable agreements affecting and specifying the plaintiff's rights and in accordance with the interpretation of the defendant and the Union of said agreements.

[fol. 6]

9.

Admits that the defendant has refused and refuses to assign plaintiff the retroactive seniority date as journey-

man machinist at North Little Rock, Arkansas, that the plaintiff requests.

10.

Denies all allegations of the complaint not hereinabove specifically admitted.

Wherefore, having fully answered, the defendant prays that the complaint of the plaintiff be dismissed with prejudice and that the defendant have all other relief to which it may be entitled.

Pat Mehaffy,
1100 Boyle Building
Little Rock, Arkansas,

Herschel H. Friday, Jr.,
1100 Boyle Building,
Little Rock, Arkansas,
Attorneys for Defendant,
Missouri Pacific Railroad Company,

By /s/ Herschel H. Friday, Jr.

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

ORDER RESERVING RULING ON MOTION TO DISMISS—
December 7, 1960

On this day the Court having considered the motion to dismiss filed by the defendant herein, and being well and sufficiently advised,

It Is Ordered that ruling on said motion be, and the same hereby is, reserved pending a consideration of the case on its merits.

[fol. 7] This the 7th of December, 1960.

/s/ J. Smith Henley,
United States District Judge.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

AMENDED COMPLAINT—filed March 22, 1961

Plaintiff amends his original complaint herein for the purpose of correcting the citation of UMTSA in paragraph I, and eliminating from paragraph V reference to the memorandum of agreement dated December 4, 1945.

I.

The jurisdiction of this Court is based upon the provisions of Section 9(d) of the Universal Military Training and Service Act (Act of June 24, 1948, as amended).

II.

Plaintiff, Robert C. Brooks, brings this action seeking adjustment of his seniority as a journeyman mechanic at North Little Rock, Arkansas, and for such other relief as the Court may find him entitled to.

III.

Defendant is now engaged, and at all times material hereto was engaged, with a place of business in the City of North Little Rock, Pulaski County, Arkansas.

IV.

Plaintiff, Robert C. Brooks, was originally hired by defendant as an apprentice machinest at Monroe, Louisiana, on July 5, 1951. He left this position to enter military service on or about January 24, 1952, and entered military service on February 1, 1952, and was honorably discharged therefrom on November 7, 1953. Plaintiff pos- [fol. 8] sesses a certificate of satisfactory performance of military service, and applied for reinstatement and was reinstated by the defendant as an apprentice machinist at Monroe, Louisiana, on November 23, 1953.

V.

A collective bargaining agreement effective September 1, 1949, between defendant and System Federation No. 2, Railway Employees' Department, American Federation of Labor, governs apprentice mechanics' positions which plaintiff left to enter military service. Apprentice machinists' positions were further governed by an agreement between defendant and System Federation No. 2, dated January 12, 1956, effective January 1, 1956, revising Rule 37(e) of the September 1, 1949, agreement.

VI.

Following his military service and reinstatement by defendant at Monroe, Louisiana, on November 23, 1953, plaintiff resumed his employment under the Apprentice Machinist Training Program at Monroe, Louisiana, until April 29, 1954, when he was reached by reduction in force and laid off in seniority order. Plaintiff continued in lay-off status at Monroe, Louisiana, until July 6, 1954, when he answered a system call for apprentice mechanics at the St. Louis, Missouri, shops of defendant. Plaintiff continued his training under the Apprentice Machinist Training Program at St. Louis, Missouri, until on or about July 25, 1955, when he was approved for transfer from the St. Louis, Missouri, shops to the North Little Rock, Arkansas, shops of defendant as an apprentice machinist. Plaintiff continued under the Apprentice Machinist training Program at North Little Rock, Arkansas, at that level to which he had advanced as a result of his employment at both Monroe, Louisiana, and St. Louis, Missouri, completing his apprentice machinist training on January 23, 1958, and was immediately employed thereafter as a journeyman machinist.

[fol. 9]

VII.

Following completion by plaintiff of the Apprentice Machinist Training Program on January 23, 1958, defendant assigned plaintiff a seniority date as a journeyman machinist at North Little Rock, Arkansas, to coincide with the date of completion of the Apprentice Machinist

Training Program, and the first day of employment as a journeyman machinist.

VIII.

Plaintiff immediately protested to defendant the assigned journeyman machinist seniority date at North Little Rock, Arkansas, on the grounds that such seniority date was incorrect under the terms of the applicable collective bargaining agreement and under the rationale of the Veterans' Reemployment Statute. Thereafter, defendant agreed to assign plaintiff a retroactive journeyman seniority date at Monroe, Louisiana, the point at which he entered into his apprentice machinist training, allegedly in accordance with applicable collective bargaining agreements and memoranda of understanding between defendant and System Federation No. 2.

IX.

Defendant has refused and still refuses to assign plaintiff that retroactive seniority date as journeyman machinist, which plaintiff would have attained had he not been absent in military service, and as a consequence thereof plaintiff has been placed in the position on the seniority roster at North Little Rock, Arkansas, at a point lower to that to which he feels he is entitled, both under the applicable collective bargaining agreement and the Universal Military Training and Service Act, and is thereby subject to premature lay-offs, opportunities, and advantages of employment which he otherwise might attain.

Wherefore, plaintiff prays judgment of this court that he be assigned that retroactive seniority date as a journeyman machinist at North Little Rock, Arkansas, to [fol. 10] which he is entitled, and for such other and further relief as the court may find him entitled to.

/s/ Osro Cobb,
United States Attorney.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

MOTION TO DISMISS AND ANSWER OF DEFENDANT WITH REFERENCE TO AMENDED COMPLAINT—filed April 4, 1961

Comes the defendant, Missouri Pacific Railroad Company, and for its motion to dismiss and answer to the Amended Complaint of the plaintiff states as follows:

The defendant moves to dismiss the Amended Complaint on the ground that the Court does not have jurisdiction of the subject matter in that the Amended Complaint calls for an interpretation of a Collective Bargaining Agreement, the exclusive jurisdiction of which question is vested in the National Railroad Adjustment Board under the Railway Labor Act, and on the ground that the Amended Complaint fails to state a claim upon which relief can be granted.

1.

Admits that the provisions of Section 9(d) of the Universal Military Training and Service Act, as amended, confer jurisdiction upon the United States District Court in a proper case but denies that this Court has jurisdiction.

2.

Admits the allegations of paragraph 2 of the Amended Complaint but denies that the plaintiff is entitled to any relief.

3.

Admits the allegations of paragraph 3 of the Amended Complaint.

[fol. 11]

4.

Admits the allegations of paragraph 4 of the Amended Complaint.

5.

Admits that there is in existence a Collective Bargaining Agreement between the defendant and System Federation No. 2, Railway Employees' Department, American Federation of Labor, effective September 1, 1949; admits that there is in existence an agreement between defendant and said System Federation No. 2, dated January 12, 1956 (or January 11, 1956), effective January 1, 1956, revising Rule 37(e) of the said September 1, 1949, agreement; and alleges that said agreements and any other relevant agreements speak for themselves.

6.

Admits the allegations of paragraph 6 of the Amended Complaint.

7.

Admits the allegations of paragraph 7 of the Amended Complaint.

8.

Admits that the plaintiff protested to the defendant the assigned journeyman machinist seniority date at North Little Rock, Arkansas, on the grounds that such seniority date was incorrect, and admits that the defendant has agreed and does agree to assign plaintiff a retroactive journeyman seniority date at Monroe, Louisiana, the point at which he entered into his apprentice machinist training, and alleges that in doing so the defendant has acted in accordance with the provisions of the applicable agreements affecting and specifying the plaintiff's rights and in accordance with the interpretation of the defendant and the Union of said agreements.

[fol. 12]

9.

Admits that the defendant has refused and refuses to assign plaintiff retroactive seniority date as journeyman machinist at North Little Rock, Arkansas, that the plaintiff requests.

10.

Denies all allegations of the Amended Complaint not hereinabove specifically admitted.

Wherefore, having fully answered, the defendant prays that the Amended Complaint of the plaintiff be dismissed with prejudice and that the defendant have all other relief to which it may be entitled.

Pat Mehaffy,
1100 Boyle Building,
Little Rock, Arkansas,

Herschel H. Friday, Jr.,
1100 Boyle Building,
Little Rock, Arkansas,

Attorneys for Defendant,
Missouri Pacific Railroad Company.

By /s/ Herschel H. Friday, Jr.

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION
No. LR-60-C-124

ROBERT C. BROOKS, PLAINTIFF

vs.

MISSOURI PACIFIC RAILROAD COMPANY, DEFENDANT

TRANSCRIPT OF TESTIMONY—September 18, 1961

Be It Remembered, that on the 18th day of September, 1961, at Little Rock, Arkansas, the above entitled and [fol. 13] numbered cause came on to be heard before Honorable J. Smith Henley, United States District Judge, at which time the following proceedings were had:

APPEARANCES.

For the Plaintiff: Honorable Charles B. Mott, Assistant United States Attorney, Little Rock, Arkansas, and Honorable T. Hagan Allin, Trial Attorney, 1114 Commerce Street, Dallas, Texas.

For the Defendant: Honorable Robert V. Light, Attorney at Law, Boyle Building, Little Rock, Arkansas.

COLLOQUY BETWEEN COURT AND COUNSEL.

The Court: Now, Gentlemen, the next case is Brooks vs. Missouri Pacific; that will be Mr. Mott and Mr. Allin for the Plaintiff, is that correct?

Mr. Mott: That is true, Your Honor.

The Court: And Mr. Light for the Defendant?

Mr. Light: That is true, Your Honor.

The Court: All right, Mr. Mott, are you prepared to proceed?

Mr. Mott: Yes, sir, Your Honor. Would you care to hear any statement before lunch?

The Court: I don't think it is necessary. Now, how much testimony do you have in mind there will be?

Mr. Mott: I have three witnesses, Your Honor; it will probably take about an hour.

The Court: How many do you have, Mr. Light?

Mr. Light: Your Honor, I have on call and available five or six; I am not sure I will use them all.

The Court: I had in mind we would finish this case in about a half hour.

Mr. Mott: I had hoped to stipulate it, Your Honor, and so did Mr. Light, but—

The Court: What facts are in dispute; what is it necessary for us to prove?

Mr. Mott: Basically, I believe we are at disagreement concerning the retroactive time.

[fol. 14] The Court: You mean this is a question of fact as opposed to a question of law?

Mr. Mott: Question of interpretation, I believe, Your Honor.

The Court: Well, there is no dispute about the dates involved, is there?

Mr. Mott: I am not sure which date they want to bring up affecting the retroactive time. It is our position that the retroactive date would be equivalent to the date he was in the military service. However, it is my understanding that the Company would like to bring other facts into it, and I am not familiar with the facts they would like to present.

The Court: What facts do you want to show?

Mr. Mott: That Robert Brooks entered military service on January 24, 1952, as plead—beg your pardon.

The Court: Any dispute about that?

Mr. Mott: I beg your pardon, February 1, '52.

The Court: February 1st—any dispute about that, Mr. Light?

Mr. Light: That is admitted in our answer.

The Court: All right, what else?

Mr. Mott: Discharged November 7, '53.

The Court: Isn't that also admitted?

Mr. Mott: Yes, sir. Now, it is our position that that is approximately one year, nine months and seven days, or thirteen, something, what ever that—

The Court: Whatever it figures out?

Mr. Mott: That is right. It is our position that from the date of completion of his apprenticeship training, which also is admitted in the pleadings to be January 23, 1958.

The Court: Well, isn't the question, so far as you are concerned, whether under these agreements and under the Act the plaintiff is entitled to have his seniority effective at Little Rock rather than at Monroe?

Mr. Mott: That is the primary question, true, but also it is our position that the date that the journeyman seniority commences is put back the comparable dates to what he was in the military service, or the one year, nine months.

[fol. 15] The Court: You mean it ought to be put back to January 23, 1958?

Mr. Mott: True, for the same period of time that he was in the military service.

The Court: Whether it is at Little Rock or at Monroe?

Mr. Mott: Well, we don't think there is any question about the second point, but I rather hold that for another

—we are not asking for anything other than that which we feel is definite. Now, if you extend that date beyond the actual period of time he was in the service, then we run into conjecture and possibilities and things of that nature; so we are advancing the position that the '58 date would be run back for purpose of seniority to a date which is approximately April, 1956.

The Court: Now, do you say that that result is required by the Act or by the agreements or by both?

Mr. Mott: Both.

The Court: Now, where in your pleadings do you ask for that relief?

Mr. Mott: Paragraph 8, Your Honor, the plaintiff immediately protested the assigned journeyman machinist seniority date at North Little Rock, Arkansas, and in 9 the basis for it.

The Court: I didn't understand there was any question in the case—maybe I missed it—but this is the time to straighten it out. I didn't understand there was any question in the case about his being given credit, we will say, on the seniority list for his military service at Monroe, but the question was whether he was entitled to any credit for it prior to, and I will use this 1958 date, at Little Rock.

Mr. Mott: That is actually as far as we know; we don't have another date. We took the position that we had to come into Court and say at least we are entitled to something; now what, can be proven. Now, we also claim that seniority date would be at Little Rock and not Monroe and not both.

The Court: Well, now that is a matter of law, isn't it, and interpretations of the agreements?

Mr. Mott: Right.

[fol. 16] The Court: All right, then, what testimony do you need to put on of any fact that isn't already in the record?

Mr. Mott: One, chiefly we would like to put on what is the custom and practice regarding the application of seniority date; also custom and practice regarding apprentice employees at this particular time to show that this man had a job available in Little Rock had he been a journeyman.

The Court: You mean prior to 1958?

Mr. Mott: Yes, sir. Now, we—

The Court: Is there any dispute about the custom and practice? Gentlemen, what difference does custom and practice make in the light of the written agreements?

Mr. Mott: If the Court please, without taking advantage—

The Court: Tell me what your theory about it is.

Mr. Mott: It would be our proof that during this period, during the period commencing approximately July, '55 on through the period of the next two or three years, which would be involved, during that period the North Little Rock shop was in a position of not having sufficient journeymen to fulfill the qualified journeymen's position. As proof of that during that period apprentices who were not journeymen were by custom and practice upgraded to journeymen status for the benefit of fulfilling these journeymen spots or journeymen positions. Now, by virtue of the seniority of Mr. Brooks being dated back to the earlier date he would have been a qualified journeyman to fulfill the spot then being occupied or then being filled by the apprentice; and by virtue of being a journeyman qualified to hold that position would automatically displace the apprentice that was fulfilling a position as a journeyman but not qualified by the apprenticeship rules of the agreement and the Company.

The Court: All right; now, Mr. Light, what is the nature of your testimony?

Mr. Light: Your Honor, the principal issue, I think we all agree, is whether or not the retroactive seniority feature is to be applied at North Little Rock. Now, to reach that it is quite possible, it is essential, I believe, that [fol. 17] we find out or that the Court determine what the correct retroactive seniority date will be, if there is to be one. Now, the Railroad Company, acting pursuant to the collective bargaining agreement, has computed what the seniority date would be if he is entitled to a retroactive seniority date, and that date as we compute is November 3, 1955, several months earlier than the one computed by the Government, and a couple of months later, I think, than the one contended for by the plaintiff originally.

Now, does the Court desire I state our position on that?

The Court: Well, let me ask about that, now, Mr. Mott, have you made any effort to determine whether this November '55 figure would be acceptable to your client with that computation? As I recall your statement was a little later, 1956?

Mr. Mott: If the Court please, it is a matter of what we feel would be the stronger position for the benefit of our client.

The Court: You think you would be better off if you figured it another way, other than the way the Railroad has figured it?

Mr. Mott: Yes, sir.

The Court: So at this point you are not so much interested in a few months time, but in the method of computation?

Mr. Mott: As we are the—

The Court: Well, we probably won't be able to agree. Now, what else would you expect to show?

Mr. Light: Your Honor, I agree with Mr. Mott that custom and practice of the parties under these agreements is relevant to determine what they mean, particularly in the case of ambiguity, and I am prepared to put on some testimony with respect to the custom and practice of the parties, that is of the Railroad Company and of the Railroad Brotherhood, pursuant to the agreements, one of which dates back to 1945, and it is our position that the retroactive seniority date does not apply at North Little Rock, but that the plaintiff veteran was accorded his full right, both under the Act and under the collective bargaining agreement by assignment to him of the seniority date [fol. 18] as a journeyman mechanic when he completed it at North Little Rock, when he completed his apprenticeship training there, which is the January, 1958, date.

The Court: All right, does there appear to you to be any area here for stipulations?

Mr. Light: Your Honor, beyond the dates which are not disputed as reflected by the pleadings, and beyond the agreement Mr. Mott and I have stipulated as to the admission of the relevant and contractual provisions, I can think of nothing.

The Court: Gentlemen, in view of the fact it is now a few minutes after twelve I guess we better not start into the testimony until afternoon. Now, can we finish if we start at 2:30?

Mr. Mott: I think so.

The Court: I believe we will do that, we will start at 2:30. Court will be in recess until 2:30.

(Thereupon, Court recessed for lunch at 12:15 o'clock, P.M.)

AFTER RECESS.

(Pursuant to taking recess for lunch Court reconvened at 2:30 o'clock, P.M.)

The Court: You may proceed, Gentlemen.

Mr. Mott: If the Court please, shortly before we recessed, shortly before lunch, I understood possibly that it was the position of the Missouri Pacific that the Plaintiff, Robert Brooks, was entitled to retroactive seniority to the point of November, 1955. If that is a matter that they will concede, then we can dispense with that issue and proceed.

The Court: Well, they can conceded it up to a certain point, I assume. I will let Mr. Light state the point to which they concede it.

Mr. Light: I believe we can stipulate, Your Honor, that computed in the manner and by the method that all such computations have been made since the memorandum and understanding of 1945 that will be in evidence here that Robert Brooks' retroactive seniority, if he is entitled to retroactive seniority, regardless of where that might be, would be November 3, 1955.

[fol. 19] Mr. Mott: That was not as I understood prior to recess.

The Court: Well, all right, then, that is not satisfactory to you?

Mr. Light: Your Honor, if I may, let me be candid on what our position is.

The Court: All right.

Mr. Light: The custom and practice of the Railroad Company and the Railroad Brotherhood in interpreting

the agreement of 1945 has been that any retroactive seniority be computed in a manner that will develop the date November 3, 1945, to employees in the same or similar position of employees as Mr. Brooks, such seniority to be assigned and placed on that seniority roster at a point where he entered his training, which was Monroe, Louisiana, in this case; and that has been the custom and practice and—

The Court: Well, that is what I understood you to say this morning. Your position is simply that he is not entitled to that at Little Rock?

Mr. Light: Yes, sir, North Little Rock.

The Court: At North Little Rock; now, is that any help?

Mr. Mott: No, Your Honor, it evades the issues, both of them. If the man is entitled to retroactive seniority he would be entitled to it on the basis of Section 9 of the Universal Military Training Act at either place.

The Court: Well, you are talking now, I think, about a question of law, aren't you? As I understand it, the Railroad says: (1) That under their practice and the way they have construed the agreements and the Act that Brooks and others of his class would be assigned and were assigned and have been assigned seniority retroactive at the place where they completed their apprentice training, which, they say in this case, was Monroe.

Mr. Light: Where he commenced his training.

The Court: Excuse me, where he commenced his apprentice training, which in this case was Monroe, and which, as they compute it, is November 3, 1955.

Now, do I understand further, Mr. Light, that it would be the position of the Railroad and the Railroad is prepared to concede that if Mr. Brooks is entitled to this [fol. 20] same seniority retroactive provision at North Little Rock under the Company's practice, if it were applied to North Little Rock, the date there would be 11-3-55 also?

Mr. Light: Yes, Your Honor, we will concede and stipulate that if—and certainly that is an "if"—

The Court: I understand it is.

Mr. Light: If he is entitled to retroactive seniority at North Little Rock the date would be November 3, 1955.

The Court: Now, is that what you are trying to reach?

Mr. Mott: That is agreeable, Your Honor; if he is entitled to it at any place that would be the date.

The Court: .....

Mr. Mott: Regardless of where the place might be.

The Court: Well, North Little Rock or Monroe. We are not talking about any other place, are we?

Mr. Mott: True.

The Court: Is that satisfactory?

Mr. Mott: Yes, sir.

The Court: Very well. You may call—well, do you need to call any witnesses now?

Mr. Mott: Yes, sir, Your Honor.

The Court: Please, do.

Mr. Mott: Call Mr. L. L. Francis.

LEONARD L. FRANCIS, a witness called by and on behalf of the Plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination.

Questions by Mr. Mott:

Q. Will you state your name and occupation, please? A. Leonard L. Francis, Apprentice Instructor with the Missouri Pacific Railroad.

Q. During the period 1955 and 1956 and '57 and '58 were you holding that position? A. Yes, sir.

Q. During the years—now, these next questions will relate to the four years which I have mentioned, 1955, '56, [fol. 21] '57 and '58—during the years did you of your personal knowledge or as a part of your duties as an apprentice instructor determine or have made available to you information which would designate the apprentices who were upgraded to journeyman duty? A. Well, I would say in most cases; my records didn't require that I keep an updating record and a back-dating record.

Q. But you had made available information to indicate at what point different individuals were up-graded? A. When information was passed to me why I made a note on my forms that I keep some technical training records on, yes, sir.

Q. You personally made notes on the individual employee's personnel card at the date at which they were up-graded? A. That is true, when I was notified of it; now, there may be some cases they were up a couple of days and back that the information never did get to me; but any time I was notified that they had been up any length of time there was a note made on their training record.

Q. If you will, Mr. Francis, let's take a specific period, 1956, do you recall in 1956 whether there were any apprentice employees of Missouri Pacific of the North Little Rock shop up-graded to journeyman duties?

Mr. Light: May I inquire here, Your Honor, is he confining that to apprentice machinist? That is the only thing we are dealing with here.

Q. That is true, apprentice machinist employees? A. The records indicate there were some boys set up during the month of January. Now, my memory wouldn't take me over the other months, but I see where a few were set up in January.

Q. Go back to 1955, do you know whether there were any apprentice machinist employees up-graded the latter part of 1955? A. Yes, the records indicate there were a few along about November and December, latter part of the year.

Q. Would there have been any in September or October? A. I wouldn't want to say unless I could see the records on it.

The Court: Well, where are the records; do we have them?

[fol. 22] Mr. Mott: Yes, sir.

(Document passed to counsel.)

Mr. Light: Your Honor, we can stipulate these are the individual records of, I believe, thirteen or fourteen machinists who have been employed, and most of them are employed by the Missouri Pacific Railroad Co. at the North Little Rock shop.

Q. I hand you some personnel records of various employees of the Missouri Pacific. A. You want to know for '55?

Q. Yes, sir, in 1955 is there any indication there that there were any employees up-graded? While you are looking through it, Mr. Francis, is it somewhat a common practice at the Little Rock shop to up-grade apprentices for journeymen's duties? A. It has been for a number of years where we didn't have sufficient mechanics to fill our needs we put apprentice boys up temporarily.

Q. Did that commence possibly during the war? A. Yes, sir, during the war and I will say up until six months ago, or even less time than that, off and on through the year send the boys up and back.

Q. What would the effect have been if an apprentice had completed his apprentice training and had obtained a journeyman status, would he have taken the place of one of the apprentices that was up-graded? A. Yes, they would have hired him and if the force wouldn't stand the increase of another man they would take the youngest apprentice, youngest temporary set up apprentice and set him back to an apprentice.

Q. Is there any question in your mind in November there were apprentices, October, November, December of '55 there were apprentices serving in a journeyman's status? A. November and December I would say; I have not come across October yet.

Q. Mr. Francis, in determining who of which employees, apprentice employees would be up-graded, how is that determined? A. Well, actually I don't administer that, but I understand that they take the boy that is, that has the most number of days served toward his apprenticeship and he goes up first.

[fol. 23] Q. Now, in determining who would be dropped in the event a journeyman obtained his seniority or another mechanic journeyman came into this shop, how would they determine which apprentice would be bumped? A. Well, the youngest one, the last one to go up to mechanic would be the first one to go back down if he would be the youngest temporary set up man. A journeyman—

The Court: Keep your voice up. It is rather difficult in this large room to hear many feet away. Now, Mr. Mott, if you didn't get the answer you want, the Court has interrupted, ask him again.

Q. I will go to the next question. You are familiar with the personnel file of the plaintiff, Robert Brooks?

A. I have seen it recently; I wouldn't say I am personally acquainted with it.

Q. Does that file reflect that Mr. Brooks was elevated or up-graded during his apprentice term? A. Yes, it indicates that he was temporarily set up on two different occasions.

Q. Was he performing journeyman machinist duties when he was up-graded? A. I wasn't there, but I assume he was, they were paying him for that, I presume he was performing machinists duties.

Q. I believe that is all.

Cross-Examination.

Questions by Mr. Light:

Q. Mr. Francis, you are in charge of the apprentice training program for the entire Missouri Pacific Railroad system, are you not? A. Yes, sir.

Q. How long have you held that capacity? A. Since August 14, 1940.

Q. What is the requirement to complete an apprenticeship for an apprentice machinist, as Mr. Brooks was? A. Well, on our railroad we have requirement of completing 1040 working days, and in addition to that each apprentice has to participate in a technical training course, consisting of two written lesson papers that he must submit each month, and he must keep this training up and not fall more than three months delinquent or he is subject to discipline and can be removed from service.

[fol. 24] Q. These papers you have reference to are a correspondence course? A. Yes, sir.

Q. And he must complete 1040 working days as an apprentice? A. Yes, sir.

Q. And that works out to be something slightly over four years, does it not, if you assume five working days a week? A. That's right, with holidays and paid vacation time taken out it takes about four years and two months by the calendar to get 1040 working days completed.

Q. Now, does a machinist apprentice progress through the apprentice program by simply being on the job, purely

the passing of time type situation? A. Well, I don't know that I understand what you mean by that. Will he pass through his apprenticeship?

Q. You have already testified that he has to do his papers satisfactorily? A. And he must perform satisfactorily in the shop; he could be taken out for not showing the proper aptitude.

Mr. Light: I have no further questions at this time, and I would like Mr. Francis to be excused subject to being called back as my own witness.

The Court: Very well. Any further questions, Mr. Mott?

Mr. Mott: Yes, sir.

Re-Direct Examination.

Questions by Mr. Mott:

Q. During the first six months of his apprentice training what is the basis of the employment relationship, and by that I mean what is necessary for the Railroad to discharge that apprentice during the first six months? A. Well, for various reasons he can be discharged; he is on probation for the first period of the apprenticeship, the first 130 working days. He could be dismissed by not keeping up with his technical training or be dismissed by being habitually absent from work without notice, or he could be the type that gets injured about every second or third day and they wouldn't want to keep him around.

Q. Does that relationship change after six months? A. Yes, you can't remove him under a probationary [fol. 25] clause after six months, it would have to be some other legitimate reason.

Q. What would that legitimate reason be? A. It could be various things it could come out of; an apprentice particularly the lesson situation could remove him. If he got down in the shop and got in a fight with another employee why that could be a reason, various reasons.

Q. But it requires some cause, some justification on his part, and it is not a discretionary matter? A. That's right.

Mr. Mott: That will be all.

Re-Cross-Examination.

Questions by Mr. Light:

Q. Mr. Francis, if an apprentice commits some act or fails to commit some act that gives rise to disciplinary action it would be in the discretion of the Company whether to fire him or keep him and give him another chance, wouldn't it? A. Well, it would to a point, but if he belongs to a labor organization I think both sides would get in on it before he was dismissed.

Q. Both the Railroad Company and the labor organization would have a play in that decision? A. I think so.

The Court: That is after he had been there six months?

The Witness: That's right.

The Court: Anything further from this witness?

Mr. Mott: That is all, Your Honor.

The Court: You may stand aside, but don't get away, Mr. Light indicated he may want to recall you later.

Mr. Mott: May we have a couple of minutes?

The Court: Before you have that, let us assume Mr. Brooks had not been in military service at all and had completed his apprentice training at Monroe, where he started it, we will say, would his seniority once he got it established as of the day of having completed the training would his seniority have been only with respect to Monroe or would it have been with respect to any place on the system of the Missouri Pacific, the same date? Can you tell me that, Mr. Light?

[fol. 26] Mr. Light: I will answer this subject to the other side disagreeing with me. These crafts here involved, the machinists and other groups under this same contract, have what is known as point seniority, meaning they have seniority at the particular point, which they cannot transfer from one point to another ordinarily. That is the general basic principle of how their seniority reads. If he had completed it in Monroe where he started and had not been in military service and had been employed at Monroe as a journeyman machinist he would have had seniority as of the day his pay started as a journeyman machinist at Monroe.

The Court: Now, where did this man complete his apprentice training?

Mr. Light: He in fact completed it at North Little Rock.

The Court: All right.

Mr. Mott: Call Mr. Brooks.

ROBERT C. BROOKS, called as a witness was examined and testified as follows, after being first duly sworn.

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: Let me ask you—maybe you answered this and maybe you didn't—let us assume again that Mr. Brooks had not been in military service at all, and had commenced his training at Monroe, as he did, and had done some of it at St. Louis, I believe, as he did, and had completed it at North Little Rock, as he did, once he completed his training at what point would his seniority have been established? Would it have been Monroe, St. Louis, Little Rock or all three or two of the three?

Mr. Allen: As a journeyman, if Your Honor please.

The Court: As a journeyman.

Mr. Mott: Your Honor, that is the question involved.

The Court: Well, I want to know what would happen if he had not been in military service—somebody ought to know that.

Mr. Light: Your Honor, I think I know what the question is, and I believe I can answer it. Prior to January 1, 1956, when an amendment to the Rule was [fol. 27] entered into, he would have received seniority at the point where he was first employed as a journeyman, his seniority being at that point. Subsequently—

The Court: Where he was first employed as a journeyman, regardless of where he completed his apprenticeship? Is that correct?

Mr. Light: That's right, the place where his pay as a journeyman started, his date of seniority being the date the pay started. Subsequent to January 1, 1956, he would be entitled to receive seniority at the place where he

completed his apprenticeship, by an amendment adopted at that time.

Mr. Mott: If the Court please—

The Court: Just a moment. Are both those instances, so far as Mr. Brooks is concerned would both those places be the same? Didn't he complete his apprenticeship at North Little Rock, and did he not first hold his journeyman rating at North Little Rock; is that correct?

Mr. Light: That's right, Your Honor.

The Court: Well, then why, can you tell me briefly, why isn't he entitled to his seniority under either theory, either in the 1956 or the subsequent agreement, at North Little Rock?

Mr. Light: Because, Your Honor, under the 1945 agreement dealing with retroactive seniority, which is the only instrument anywhere that gives him retroactive seniority, by contract between the Brotherhood and the Railroad the seniority to be given retroactively is fixed at the point where he entered his apprenticeship—

The Court: So it is your position then: First, that he doesn't get any at all at Little Rock, retroactive seniority; and if he does so he gets it not by virtue of the retroactive agreement of 1945, the agreement of 1945 in respect to retroactive seniority, but by virtue of the Act in question, and you say he doesn't get it under that.

Mr. Light: Well, I certainly say he gets it under neither at North Little Rock, Your Honor.

The Court: All right; I wanted to clear that up in my own mind as we went along.

[fol. 28] Mr. Mott: Does the Act that was referred to or the understanding referred to, December 4, 1945, understanding or memorandum by which the normal rules are changed?

The Court: That seems to be the one you set up, or one of the ones you set up in your complaint, paragraph 5.

Mr. Light: December 4, 1945.

Mr. Mott: If we can have an agreement that except for the December 4, 1945, memorandum that the seniority of Mr. Brooks would have been Little Rock, then we can go forth and I can shorten Mr. Brooks' testimony.

Mr. Light: Your Honor, I can hardly agree to that for except for the memorandum agreement of December 4,

1945, he would have had no retroactive seniority. That is the only agreement made anywhere with reference to this case for retroactive seniority.

The Court: I think you are saying maybe the same thing except in slightly different words. What is it you want to have conceded, Mr. Mott?

Mr. Mott: I understood from Mr. Light that the normal seniority of the journeyman machinist upon completion would have been the point at which he completed it, I mean commenced it, had completed his apprentice training.

The Court: Now wait a minute; we are talking about two different things.

Mr. Light: You are not talking about retroactive seniority?

Mr. Mott: No, sir.

Mr. Light: There is no dispute, as far as I know, except for this retroactive feature, Mr. Brooks' seniority is now fixed where he both completed his apprenticeship at North Little Rock and where he was first employed as a journeyman machinist at North Little Rock on the day he—

The Court: His seniority as a journeyman—

Mr. Light: Right.

The Court: Is from North Little Rock. Now, we have no problem about that. What gives us difficulty is this retroactive part under the 1945 agreement or under the Act of Congress. Is that what we are talking about; is [fol. 29] there any other agreement other than the 1945 agreement that affects retroactive seniority?

Mr. Mott: The 1956 agreement, but the date that we have agreed upon is prior to that date, so I don't believe that would be material to this determination.

Mr. Light: I concur with that, Your Honor, the date we have stipulated he would have completed his apprenticeship had it not been for military service.

The Court: Before the 1956 agreement?

Mr. Mott: But in the alternate, if we are basing it on the completion date, then the 1956 agreement would have been in effect, because that was after he completed it, I mean that was prior to his completion. This is a two edged sword, Your Honor.

The Court: Well, I don't know whether it is two, one or four. Now, let's start over. His seniority as a journeyman is at Little Rock. No doubt about that, is there? And it runs from the date when he was first employed as a journeyman, which is Little Rock?

Mr. Mott: Yes, sir.

The Court: Or perhaps under some other agreement when he completed his training, which was at Little Rock. In either event it is the same place and the date, the retroactive date, if there was any, is November, 1955. Now, suppose there was no retroactive agreement, when did he complete his training, if we leave out the retroactive feature of the agreement.

Mr. Mott: January 23, 1958, as I recall.

The Court: Now, is it your point that since he didn't complete his training in fact until January, 1958, that some other agreement might affect it?

Mr. Mott: Yes, sir, Your Honor.

The Court: Such as the 1956 agreement?

Mr. Mott: By virtue of the fact that his completion date was subsequent to the 1956 amendment, which changed what is referred to as Rule 37(e). 37(e) was amended to read: Upon completion of his apprentice at any point an apprentice will automatically establish seniority as a journeyman machinist mechanic in his respec-
[fol. 30] tive craft at such point, which will date from the time of the completion of the apprenticeship.

The Court: Well, that's still Little Rock?

Mr. Mott: That is still Little Rock.

The Court: And still the date of completion, which is 1958, and I suppose it is not far different from the date when he was first employed as a journeyman?

Mr. Mott: January 23rd, and that was effective January 1st.

The Court: That was still Little Rock?

Mr. Light: North Little Rock.

The Court: Yes, North Little Rock.

Mr. Light: Yes, sir.

The Court: That still doesn't say anything about retroactivity, does it?

Mr. Light: No, Your Honor, the only thing that says anything about retroactivity is the 1945 agreement.

Mr. Allin: If Your Honor please, Section 9(g) of the Selective Service Act, and also the Universal Military Training Act of 1948, provides the treatment to be afforded returning veterans. Selective Service Act has been in effect since, an interpretation of it in 1945 undoubtedly is the reason for incorporating it in a collective bargaining agreement, the memorandum of understanding referred to, the 1945 agreement, as treatment to be afforded returning veterans. The treatment to be afforded them is both by union contract and by statute, and it is an effort on the part of the Company and the Union without question in the 1945 memorandum of understanding to comply with what their understanding of the Act might be. Now, that's the retroactive seniority that we are speaking of. Now, under the Statute, it is our position that the veteran is entitled to that treatment that he would have had in the normal process of his employment had he not entered into military service.

The Court: Under the Act?

Mr. Allin: Under the Act, that's right.

The Court: All right, now, what the Court is trying to do is to eliminate as many of these agreements as pos-
[fol. 31] sible from consideration. I am trying to determine whether I can't decide the case on the basis of an application of the Act of Congress and/or the 1945 agreement or both. I am wondering if we haven't eliminated these other agreements. I am trying to boil it down so I can understand the testimony and decide the case with some degree of understanding.

Mr. Allin: I'm afraid the Court can't eliminate either that '45 memorandum of understanding—

The Court: I'm not trying to eliminate the '45.

Mr. Allin: —or the collective bargaining agreement.

The Court: Well, you tell me now how the '56 agreement affects this case.

Mr. Allin: Well, if Your Honor please, the '56 agreement would give Brooks, for instance, seniority at the place of completion. Now, I don't know the history of that Rule or that memorandum of understanding, or why it was entered into between the Union and the Company, but it would certainly without question remove any doubt

as to whether or not from January 1, '56 on an apprentice would be entitled to a seniority date at the point of completion, and not at some other place where he might have started his training. Now, it does do that, the '56 memorandum of understanding. Now, the reason behind it and all I am not familiar with, and I haven't been able to find out anything definite about it, and I don't believe Mr. Mott has, from what we have been able to find out from other witnesses we discussed it with, but it is there in any event. It was effective January '56 and the veteran completed at least two years or more of his apprenticeship training under that memorandum of understanding, which was part of the collective bargaining agreement. At least when ever he would have completed it, the fact he did complete it in January '58, he is entitled to the benefit, if there is any benefit to be obtained as a consequence of the collective bargaining agreement.

The Court: All right, go ahead. I though I understood it, but I guess I don't.

Mr. Light: Your Honor, may I say one more thing. He has had the benefit of it. As I understand, as I understand there is no dispute he has been awarded his sen-
[fol. 32] iority at North Little Rock when he completed subsequent to this '56 agreement; and now what we are talking about is whether we are going to make his seniority retrospective under this memorandum of agreement of 1945. He has had the benefit of the 1956 agreement in the seniority he has been awarded.

The Court: Well, I thought that was the case earlier, but I have decided I don't know what it is, so let's go on with the testimony.

Direct Examination.

Questions by Mr. Mott:

Q. Will you state your name? A. Robert C. Brooks.

Q. By whom are you presently employed? A. Missouri Pacific Railroad Co.

Q. In what capacity? A. Machinist.

Q. How long have you been employed as a machinist? A. Since January 23, 1958.

Q. Prior to that date what was your employment? A. Apprentice machinist.

Q. How long were you employed at Little Rock? A. As an apprentice machinist from July 25, 1955.

Q. Until— A. Until January 23, 1958.

Q. What were the circumstances by which you gained your employment at Little Rock or the North Little Rock shop? A. By request of transfer.

Q. Will you elaborate a little bit more? A. I asked for a transfer to the North Little Rock shop and it was approved by the master mechanic or shop superintendent, which ever you want to call him, and it was approved by the master mechanic at North Little Rock and the master mechanic at St. Louis.

Q. Now, you say he approved your transfer; is there anything to indicate whether that was a permanent or temporary transfer? A. Not on my part, no, sir.

Q. Why do you say not on your part? A. Well, as I recall I asked for a transfer; I didn't ask for a temporary transfer or didn't specify temporary or permanent; all I asked for was a transfer.

Q. Did you at any time indicate any desire to have a permanent or temporary transfer?

[fol. 33] The Court: He just said he asked for—

Q. That was subsequent? A. I was under the impression it would be permanent since there were no apprentice jobs at Monroe, and no evidence that there ever would be another apprentice job at Monroe.

Q. Did you subsequent to your application for transfer notify the Company any further of your intention or the Union, who ever would be the responsible party? A. Repeat that, please.

Q. Subsequent to your application for transfer did you ever notify the responsible party of any intent on your part to make the transfer permanent or an intention it should be permanent? A. Yes, sir, on, if I recall the date correctly, January 9, 1958, I wrote the Company a letter relinquishing my right as an apprentice at Monroe, since there was, as far as I am concerned there was no job at Monroe as an apprentice for me, there would not be a job as machinist at Monroe for me at which time I would finish my apprenticeship.

Q. You say there would not be a job at Monroe; as of the date you completed your apprenticeship training what were the circumstances of the shop there at Monroe? A. To the best of my knowledge there were three and possibly four machinists working at the Monroe shop.

Q. Would you have had a chance to obtain a job there as a machinist? A. Not with machinists laid off at Monroe.

Q. Did that have any bearing upon your letter of January that you mentioned? A. Yes, sir.

Q. And why did you write that letter at that particular time? A. Because I was advised by my local Chairman at North Little Rock, and when I say advised I mean orally, there was nothing in writing, and I was advised by the then Chief Clerk to the master Mechanic at Monroe to relinquish my right there so that I would come under this January 1, '56 agreement establishing seniority at the point where I would complete my apprenticeship.

Q. Do you know of any rule in the agreement between the Railroad and the Union that would permit you to transfer permanently as opposed to a temporary [fol. 34] transfer? A. I think that is the—that rule 15, is that the rule you are speaking of?

Q. Yes, Rule 15.

The Court: Gentlemen, if there is such a rule and if you have it don't ask Mr. Brooks to remember it. Just produce it; he doesn't remember verbatim the rules. The Court doesn't think he does.

Q. Does Rule 15 provide for a permanent transfer of seniority? A. May I read the rule? Rule 15: "Employees transferred from one point or seniority sub-division to another with a view to accepting a permanent transfer will after 30 days lose their seniority at the point they left, and their seniority at the point to which transferred will begin on the date of transfer, seniority to govern. Employees will not be compelled to accept a permanent transfer to another point or seniority sub-division."

Q. Were you by your act indicating an intent to transfer your permanent seniority, whatever it might be? A. Yes, sir.

Mr. Mott: I believe that is all.

Cross-Examination.

Questions by Mr. Light:

Q. Mr. Brooks, are you familiar in general with this agreement from which you just read rule 15? A. Well, I wouldn't say that I am familiar with the complete agreement. I have read portions of it.

Q. You have been employed by the Railroad except for your time in Service for around ten years, and during that entire time you have operated under this agreement, have you not? A. Yes, sir.

Q. What was your right, what were your rights, if any, upon completion of your apprentice training before January 1, 1956?

Mr. Allin: If it please the Court, I believe he is asking the witness to draw a conclusion of law which this Court is asked to draw?

The Court: If he can help the Court any let him say; the Court needs help.

Q. Mr. Brooks, it has been stipulated here that had you not gone into military service you would have completed [fol. 35] your apprentice training on November 3, 1955; now, had you completed your apprentice training on November 3, 1955, did you have any right by any Rule in this book that you are aware of or any other agreement outstanding between your labor organization and the Company to be employed as a journeyman machinist? A. To the best—

Q. Do you know of any such rule? A. I don't know of any such rule, but to the best of my knowledge, I will answer this to the best of my knowledge, an apprentice upon completion of an approved apprentice program is awarded a journeyman status, becomes a journeyman machinist, becomes a journeyman, and the way I understand it if I had completed my apprenticeship in Monroe or any other point in November of 1953, I could have come to North Little Rock and upon passing a physical examination gone to work at North Little Rock as a journeyman machinist.

Q. All right, let me ask you this, you would have been qualified upon completing your apprenticeship satisfac-

torily and getting what ever certificate you have to that effect to be employed as a journeyman machinist by the Missouri Pacific Railroad Co.? A. Yes, sir.

Q. Did you understand the Missouri Pacific Railroad Company was obligated to employ you then as a journeyman machinist, if there was no vacancy they didn't have to employ you, did they? A. That's right.

Q. And if they didn't want to employ you even if there were a vacancy they didn't have to, did they?

A. I'm sorry.

Q. I say if they didn't want to employ you and even if there were a vacancy there was nothing to compel the Railroad Company to employ you at that time? A. I couldn't answer that, since a qualified machinist, the way I understand it, has the right to "bump" an up-graded apprentice.

Q. On completion of your apprenticeship in November, 1955, had you completed it then, you wouldn't have had any seniority as a journeyman machinist, would you? A. No, sir.

Q. You wouldn't have had any until the first day you got paid as a journeyman machinist? A. That's right.

Q. Then you wouldn't have ever acquired any seniority as a journeyman machinist unless you were employed [fol. 36] as a journeyman machinist after you completed it, isn't that right? A. That's right.

Mr. Light: That is all.

Re-Direct Examination.

Questions by Mr. Mott:

Q. Mr. Brooks, were you in the Court Room a minute ago when the previous witness testified that there were apprentices up-graded occupying jobs that normally were filled by journeymen? A. Yes, sir.

Q. At the time that you completed or would have completed your apprenticeship could you have taken that job away from the apprentice then serving? A. The way I understand it I could have had I been physically qualified.

Q. Has any one ever determined that you are not physically qualified? A. No, sir.

Q. Have they determined that you are? A. Well, I am working now, therefore I would say that they have determined that I am physically qualified.

Mr. Light: There is no question about his physical qualifications.

The Court: He has been working right along, hasn't he?

Q. Now, regarding the seniority, suppose you finished or completed your apprentice training today and a man that was in another shop and had been working ten years came into North Little Rock shop tomorrow to be employed as a journeyman who would be employed, you had completed your—let me leave one day leeway. You completed it day before yesterday and a man with previous service as a journeyman came into Little Rock two days subsequent to the date you completed your journeyman—I mean completed your apprentice training, who would obtain the local job? A. I would.

Mr. Mott: That's all.

Re-Cross-Examination.

Questions by Mr. Light:

Q. One further question. I want to make sure this was clear. Assuming you had not been in military service and had completed your training on November 3, 1955, how [fol. 37] could you have obtained seniority as a journeyman machinist at North Little Rock, what would you need to do? A. Work one day.

Q. As a journeyman machinist? A. As a journeyman machinist.

Q. At North Little Rock? A. At North Little Rock.

Q. Came there and worked at least one day and got paid for that day? A. Yes, sir.

Q. Prior to December, 1956?

The Court: 1955?

Q. Prior to the agreement of January 1, 1956, that is the way it would have been? A. That's right.

Mr. Light: All right.

The Court: Anything further, Gentlemen?

Mr. Mott: Before this witness leaves the stand, is there any question about the agreement that has been tendered as part of the record?

Mr. Light: Is there anything actually in the record—let me, if I may, present agreement between the Missouri Pacific Railroad Company and System Federation No. 2 Railway Employees' Department, A. F. L. - C. I. O., mechanical Section Thereof, which included the International Association of Machinists, which is applicable.

The Court: Gentlemen, let's see if we can't get at it this way. From time to time you've held up little orange colored bound booklets, which the Court assumes includes the text of various agreements that have been referred to. Can it not be agreed among all of us that counsel may refer the Court, may cite to the Court any portions of those booklets which counsel would have the Court consider, and that those portions may, at the request of either party, be included in the record of this proceeding without the necessity of having to incorporate in the record the whole of each and every booklet which may contain one paragraph or one phrase or one page that you may want the Court to read? Can you do that?

Mr. Light: That is perfectly satisfactory.

The Court: That is you are at liberty to put in any portion of any of these agreements to which reference has been made today.

[fol. 38] Mr. Light: And we can furnish those to the Court and the Reporter after we have finished?

The Court: You can furnish them to the Court and the Reporter after we have finished the proceeding here today, and you may indicate when you furnish them which portions you would have included in the record.

Mr. Mott: Do you want that during the course of the proceedings?

The Court: You needn't do that today. You can do it at the conclusion of the hearing today, you can keep the record open, and you can furnish the Court copies, and you may furnish the Clerk a designation of the portions you wish to have included in the record.

Anything further from Mr. Brooks?

Mr. Mott: I believe I would like to let him step down now subject to being called later.

The Court: You may stand aside. Call your next.

Mr. Mott: If the Court please, regarding the submission of the rules, there is one particular rule that has been changed, and it is changed by the agreement of 1956, and so long as we can indicate that it has and can indicate the prior rule.

The Court: You can indicate any of them; give me a list of them. That is either the '45 agreement, the '49 agreement, the '56 agreement or any other that is applicable that we may have mentioned here today.

Mr. Mott: Mr. Brooks rests.

Mr. Light: Call Mr. E. P. Clawson.

E. P. CLAWSON, a witness called by and on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct Examination.

Questions by Mr. Light:

Q. Will you state your name, please? A. E. P. Clawson.

Q. Would you spell that; I believe I have misspelled it to the Reporter? A. C-l-a-w-s-o-n.

[fol. 39] Q. Where do you live, Mr. Clawson? A. Osawatomie, Kansas.

Q. What is your occupation? A. I am General Chairman of the Machinist District No. 5.

Q. That is of the International Association of Machinists? A. Correct.

Q. And does District No. 5 comprise a great number of machinists that are employed by the Missouri Pacific Railroad Company? A. Yes, sir.

Q. And does it comprise those employed by the Missouri Pacific Railroad Company in Monroe, Louisiana, Little Rock, Arkansas and St. Louis, among other points? A. Yes, sir.

Q. You have been subpoenaed to come here, have you not, Mr. Clawson? A. Yes, sir.

Q. How long have you been associated with the International Association of Machinists? A. Well, I reinstated in 1934 as a member.

Q. Have you been continuously a member of the Association since that date? A. Yes, sir.

Q. And have you on subsequent occasions been an official of the Brotherhood or the Association? A. Subsequent dates, yes, sir.

Q. On dates when you were not an official of the Association since 1934 you were a member and also an employee of the Missouri Pacific Railroad Company? A. Yes, sir.

Q. As a machinist? A. Yes, sir.

Q. Now, in your capacity as General Chairman of the Association does your job include negotiation of collective bargaining agreements for the International Association of Machinists with the Missouri Pacific Railroad? A. We make them and sign them.

Q. Does your job also include, if any question of interpretation of those collective bargaining agreements arises, the adjustment of interpretation of the agreements between the Association and the Railroad Company? A. It is my position, I do interpret them.

Q. Are you familiar with the 1945, December 4, 1945, I believe, memorandum of understanding between the System of Federation No. 2, Railway Employees Department, [fol. 40] A.F.L.-C.I.O. and the Missouri Pacific Railroad Company? A. Yes, sir.

Q. And that is the agreement that bears on retroactive seniority for apprentice veterans that are returning to the Railroad Company? A. Yes, sir.

Q. Now, does that memorandum Agreement, and I will hand it to you, does that provide at which point seniority is to be awarded retrospectively or retroactively? A. Our interpretation of it is it provides for the point where the man went to military service and returned; in other words, where he originally hired out. That is not only my interpretation, but it is the interpretation of the System Federation No. 2.

Q. I will ask you if that is actually spelled out in that Rule? A. No, sir.

Q. Do the rules actually say which point? A. No, sir.

Q. Now, do you know what the Railroad and the Brotherhood have done since 1945 with respect to assigning seniority under the provisions of that agreement of 1945 when Veterans come under its terms? A. Yes, sir.

Q. What have they done? A. Well, we have had three cases of it, if that is what you are speaking of.

Q. All right, I would like for you to take those cases and relate the history of the veterans coming under that provision? A. The first case we had was an apprentice by the name of Charlie Long from Coffeyville.

Mr. Mott: If the Court please, three cases out of several thousand wouldn't establish any custom, it seems to me, and I wouldn't see the relevancy of three cases.

The Court: I believe we will hear it. Objection overruled. I don't know how much weight it will have, but we will hear it.

Q. Proceed, Mr. Clawson? A. Charlie Long from Coffeyvile, whose service was started there and went to military service and returned to Coffeyville, and to get Diesel experience he transferred over to Osawatomie the last six weeks of his apprenticeship, and he graduated there before January 1, 1956, and he was claiming retroactive seniority under the memorandum agreement of 1945, and it was given to him at Coffeyville; on account of hiring an extra number of men at Osawatomie he [fol. 41] wanted to acquire it at Osawatomie, but it was not the decision of the General Chairman and the Federation at that time, of which I wasn't a part of it at that time, only a local chairman, he was given retroactive seniority at Coffeyville, not at Osawatomie.

Then there was a case of an apprentice by the name of Yocum, who came from Nevada, Missouri, to Oswatomie, and he entered service at Nevada, and he was in military service at Nevada, he returned to Nevada and went to work as a machinist apprentice, and was furloughed and he came to Osawatomie and graduated. He in turn claimed retroactive seniority at Oswatomie because it was at that time a major point, and it was granted to him at Nevada, and not Osawatomie. And another case a boy by the name of Russell and he came to us at Osawatomie

from Alexandria, Louisiana, and he entered military service at Osawatomie, Kansas, and on his return from military service he never returned to Osawatomie, he went to Kansas City, and in Kansas City it was the judgment of the apprentice instructor and the committeeman in Kansas City that he would have retroactive seniority at Alexandria, and that is where it was given him.

Q. Now, you have related three cases, Mr. Clawson, are those the only three cases that you have personal knowledge of that have arisen in the International Association of Machinists in your jurisdiction under this 1945 memorandum of agreement, of memorandum of understanding? A. No, I know of other cases. I had one other case a man in the machinist craft, a man who is working here in Little Rock, his name is V. J. Cooper; he is a man from Coffeyville, he went to work there as a machinist apprentice and he entered military service there and he came back to Coffeyville as a machinist apprentice and transfered over to Osawatomie and graduated, and he has retroactive seniority at Coffeyville at the present time, which he tried to establish in Osawatomie.

Q. All right, Sir, now, are there other individual cases that you can recall? A. There is in other crafts, but I don't know the names, I am not too familiar with them because I don't deal with them directly.

Q. With reference to the Association of Machinist are those the only ones you recall? The only four you recall? [fol. 42] A. Only four except Brother Brooks' that has been called to my attention.

Q. Except the case we are dealing with here today; and have you been in position with reference to the International Association of Machinists in this district where you would probably know about these questions of interpretation of the 1945 memorandum of understanding when they arose? A. I would say that, yes, sir.

Q. In other words, if there were some others you would probably know about them? A. Yes, sir.

Mr. Light: I believe that is all.

Mr. Mott: No questions, Your Honor.

WILLIAM G. ARMSTRONG, a witness called by and on behalf of the defendant, being duly sworn, was examined and testified as follows:

Direct Examination.

Questions by Mr. Light:

Q. State your name, please, sir? A. William G. Armstrong.

Q. Where do you live, Mr. Armstrong? A. St. Louis, Missouri.

Q. What is your occupation? A. My job is, my title is Assistant, Special Assistant-Personnel.

Q. Special Assistant dash Personnel? A. That's right.

Q. You are a special assistant in the office of Chief Personnel office of the Missouri Pacific Railroad? A. That is correct.

Q. How long have you been in the office of the Chief Personnel office of the Missouri Pacific Railroad Company? A. Little over ten years.

Q. And have you had formal training prior to entering that job? A. Well, in the legal profession, not in the personnel work.

Q. Would you state what your formal training is, and any degrees you may have? A. I am a graduate of Washington University in liberal arts and in school of law.

[fol. 43] Q. Are you a licensed attorney in Missouri? A. I am.

Q. In your job do you and have you had in the past responsibility of participating in collective bargaining agreement negotiations with the various railroad brotherhoods, you participating on behalf of the Railroad Company? A. Yes.

Q. When a question of an interpretation has arisen in the past of those collective bargaining agreements has it been one of your responsibilities to negotiate an adjustment or reach an agreement on an adjustment of those questions of interpretation. A. The Chief Personnel—

Mr. Mott: If the Court please, I don't believe we have a question of adjustment between the parties to the agreement, meaning the Union and the Company.

Mr. Light: I intend it solely for the purpose of qualifying what his position is and what he is in position to know and to testify to, Your Honor.

Mr. Mott: I think he would be in position to testify only what his duties are there in the Company.

Mr. Light: Well, that is what I asked him, had that been one of his duties.

Q. Did you answer? A. Yes, it is.

Q. Are you familiar with the 1945 memorandum of understanding we have been discussing here today? A. Yes, I am.

Q. Does that memorandum of understanding state where or at what point seniority is to be conferred under it, retroactive seniority? A. No, it does not specify precisely where it is to be granted, where an apprentice served part of his apprenticeship at more than one point.

Q. Are you familiar with what the practice has been since 1945, since the adoption of that agreement with respect to where retroactive seniority has been conferred upon apprentices that come within its terms? A. Yes, sir.

Q. What has been the practice? A. The practice has been to grant retroactive seniority at the point where the apprentice started his apprentice training.

Q. Has that been a practice concurred in by the Railroad Company and the—

[fol. 44] Mr. Mott: Your Honor, I think in order for this to be relevant there would have to be some practice shown. I don't believe there has been any testimony by this witness, or in my opinion by the prior witness to show that there was a practice which would qualify this witness to say that that was the practice.

The Court: Well, I think you can explore that on cross-examination. The objection will be overruled and the testimony will be received.

Q. Has that to your knowledge been a practice concurred in by both the Railroad Company and the various Associations that are members of the System Federation No. 2, Railway Employees' Department, A.F.L.-C.I.O.?

A. Yes, that is the practice.

Q. Mr. Armstrong, I hope that this will be helpful to the Court, certainly a point I had not understood, do the crafts covered by this agreement, Machinists, Boilermakers and the other crafts covered by this agreement, have what is known as point seniority? A. Yes, that is correct, the shop crafts are characterized historically by having what they call point seniority as contrasted with what might be called division seniority or district seniority or a seniority arrangement whereby the seniority of employees covers a geographical area of some size, such as an operating division of the railroad or some other geographical area.

Q. Would you explain to the Court then just exactly what point seniority is, what that means? A. It means here that the seniority of an employee subject to that agreement is limited to the point at which he is employed. Now, by point is usually meant a city or place where a mechanical facility of some kind is maintained, such as a round-house when we had round-houses or back shops when we had back shops in steam days, and now where we have diesel facilities or some mechanical facility of some kind.

Q. Now, is that spelled out to a certain extent, perhaps not enough for a non-railroad lawyer to understand it, but to a certain extent in Rule 25(a) and Rule 25(b) of this agreement we have had reference to? A. Yes, it is.

Q. I will reserve the right, then, to submit to the Court that Rule. How long has this concept of point seniority characterized the crafts—how do you refer to these? [fol. 45] The Court: The shop crafts, I believe he referred to them.

The Witness: As long as we have had an agreement with the shop crafts on the Missouri Pacific which goes back many, many years.

Q. Now, historically is there any difference in the progression that a man who goes to work for the Railroad Company normally follows geographically now from what it was in 1945 and years preceding that? A. Yes, there has been a great change in the normal employment record of shop craft employees because of the revolution brought

about by the Diesel engine. In the days of the steam engine employment had been relatively stable and the points at which steam engines were maintained had been in existence for many years. I don't mean there were not fluctuation in employment, but in the days of the steam engine you had to service the steam engine at the end of each run, which was normally a hundred miles or a little bit more at each division point, so you had to have a roundhouse where you would shake the fire and do a lot of other things on a steam engine; you had to have shop craft employees at those points; they had been in existence for many years and were relatively stable; and apprentices who would start at such a point would have an opportunity to continue there for the four year period and complete their apprenticeship program at such a point, so that we did not have except under unusual circumstances a situation where an apprentice would start his training at one point and complete his training at another point. There were some exceptions. For example if a point had only a roundhouse and an apprentice may for a period want to transfer to a bigger point where they had a backshop and he could get broader experience, but normally the apprentice would start and finish at the same point; but the Diesel engine changed all that; the Diesel engine does not have to be serviced at the end of each run, you only have to fill it with Diesel oil and water, so that it can be run for many miles before it needs any extensive servicing; and the carrier has found that it can maintain fewer number of points where the Diesel can be maintained, and the Diesel can be operated without having to be serviced at each point, which is quite a few, I haven't counted them up, we now have only four, may [fol. 46] be five points where we do any major maintenance work on Diesel engines; so that means any apprentice who started at one of the small points which has not been continued as a maintenance point, such as Monroe and some of the other points that have been mentioned here, Nevada and Coffeyville and now Osawatomie are in that situation, if the apprentice wished to continue his training he had to move to a point where this work was being continued, and that revolution in employment practices has come about with the adoption of the Diesel;

we started getting a few Diesels during the war, but the major acquisition of Diesels came after the war, and it was after the war that there was this discontinuing of maintenance points at the places where we formerly maintained steam locomotives.

Q. Under that traditional or historical operation of the point system of seniority among these shop crafts prior to 1945, prior to the entry into this December 4, 1945, agreement, when you had the relatively infrequent situation of a man leaving one point who was a member of a shop craft and going to another point on the Railroad Company, how did that affect his seniority under the then existing rules and collective bargaining agreements? A. I am not sure I understood your point, but as I had understood it under the 1945 agreement the apprentice always was given or finished out his time at his home point, and if there was employment opportunity available to him at his home point that is where he acquired seniority as a machinist.

Q. But traditionally under the point system of seniority what that means essentially is that the seniority is not transitory, it is fixed at the home point where the man entered his apprenticeship; is that correct? A. That is correct; he cannot take his seniority date that he has at his home point and transfer it to any other point.

Q. And that was the history of this practice with reference to point seniority at the time this 1945 agreement was entered into? A. That's correct.

Q. Just briefly, it might be helpful, can you explain to the Court why there is any reason, if there is any reason, to have point seniority? What the alleged benefits are? A. Well, for the—

[fol. 47] The Court: Mr. Light, if you are offering that merely to help the Court, I don't think the Court needs that.

Mr. Light: Very well, Your Honor, I'll ask another question.

The Court: I can see a number of advantages to it, and in the present circumstances in the light of the Diesel developments some disadvantage.

Mr. Light: I withdraw that question, Your Honor and will ask this one final—

Q. You are familiar and have been familiar for some ten years or more with this contract that we have been dealing with today, are you not? A. Yes.

Q. Is this the only collective bargaining agreement between the Missouri Pacific Railroad Company and the International Association of Machinists? A. Yes.

Q. The one I have here is marked effective June 1, 1960, that is a compilation of the original agreements and all amendments thereto up through that date? A. Well, not quite all, but all of them that I know of that pertain to this case have been referred to here today and made a part of the record.

Q. With your knowledge of the contracts existing between the Railroad Company and the International Association of Machinists I will ask you whether there was any contract in effect prior to January 1, 1956, that would require the Railroad Company to employ an apprentice machinist upon the completion of his apprenticeship? A. No, there was not.

Q. What option did the Railroad Company have with reference to an apprentice machinist when he completed his apprenticeship? A. The carrier could either employ the apprentice as a machinist if they needed one or they could not employ him.

Q. What if they needed one and didn't want him? A. They would not have to employ that particular graduate apprentice if they did not think he was suitable for their employment.

Q. Prior to January 1, 1956, an apprentice machinist had no contract rights to become employed as a journey-
[fol. 48] man machinist upon the completion of his apprenticeship, is that right? A. That's correct.

Mr. Light: Your witness:

Cross-Examination.

Questions by Mr. Allin:

Q. Now, Mr. Armstrong, Rule 25(a) of the collective bargaining agreement of 1960, states that seniority of employees in each craft covered by this agreement shall be confined to the point and seniority subdivision em-

ployees; is that correct? A. You have read the Rule correctly, I believe.

Q. Mr. Brooks completed his apprenticeship January 23, '58 as an apprentice here at Little Rock? A. That is what I understand.

Q. And he was employed as a journeyman here at Little Rock? A. He was.

Q. And until he has been employed as a journeyman, in a journeyman capacity, at Monroe or any other place, he acquired no seniority at either of those places; is that correct? As a journeyman? A. You are speaking as of January 23, 1958?

Q. Mr. Brooks has been employed here at Little Rock since January 23, 1958, as a journeyman mechanic; is that correct? A. That is correct.

Q. Has he acquired any seniority at Monroe, St. Louis or any other point on the system as a consequence of his employment here at Little Rock? A. When he came out of his apprentice training he was offered an option, he was offered the opportunity to accept a seniority date at Monroe as of November 3, 1955, or he could go to work at Little Rock; and he chose to go to work at Little Rock, and because of the point seniority rule he cannot hold seniority at two points, and he did not choose to go back to Monroe for a perfectly good reason, and it was a wise decision on his part, there was no employment opportunity there, and so the only seniority that I know that he has is the seniority here at Little Rock.

Q. Do you know whether or not there was any employment opportunity at Monroe? A. I feel confident there was no employment opportunity—

[fol. 49] Q. Did you ever offer him, as far as you know as personnel officer, of the Company at St. Louis, did you ever offer him any employment opportunity at Monroe? A. We did not offer him any employment opportunity at Monroe because there were machinists already on the seniority roster at Monroe who were furloughed who under the agreement we would have to employ before we could employ Mr. Brooks.

Q. And immediately upon completion of his apprenticeship at Little Rock he was immediately employed? A. As far as I know the same day.

Q. That is the usual and customary practice and has been for some time, particularly at Little Rock, isn't that correct, Mr. Armstrong? There has been a shortage of journeymen mechanics here at Little Rock over a period of some four or five years? A. Over the last four or five years, well, I have a general knowledge of that subject and can give you a general picture, but I have no specific knowledge of the force requirement at Little Rock; and, of course, it fluctuates from time to time; for example, in '58 there was quite a recession and quite a force reduction at that time, but generally speaking the volume of work at Little Rock has been maintained and except for these periodic fluctuations we have been hiring machinists just because of the natural turnover and—

Q. You have been upgrading apprentices in mechanics classification temporarily due to that shortage of journeymen mechanics? A. I have no knowledge of that, I don't know that one way or the other in connection with my duties.

Q. Now, Mr. Armstrong, is it your testimony that a journeyman machinist without any seniority at Little Rock could not displace an upgraded apprentice working at Little Rock in a journeyman's position; is that your testimony? A. No.

Q. Well, answer the question yes or no, whether he would or would not displace an upgraded apprenticeship? A. I can't answer it yes or no. We have a right, under the—well, we did have a right, I will say, under an agreement with the International Association of Machinist, that is between the Railroad and the Machinist [fol. 50] Craft, executed during the war period, when we could upgrade a "B" mechanic apprentices and helpers to machinists. As I say we had that right when there was a shortage of mechanics, mechanic machinists; the reason being that under the classification work rules of the machinists none but a machinist is entitled to do machinist work; but we got relaxation from that requirement from the organization during the war so that we could run the railroad, and we could upgrade these men, and now since that time—I can't give the date—that agreement has been canceled, is no longer in effect as a

general agreement between the Railroad and the Machinists; but there has been some practice, I know, even after that agreement was worked or canceled whereby apprentices and helpers could be upgraded where agreement was reached locally between the master mechanic and the local committee. Now, the right to upgrade apprentices is based on the fact that there is not a mechanic available, so the inverse stand is if a mechanic is available he is entitled to work; so if there is a mechanic who wants to work now, for example, we said there were several machinists at Monroe that were furloughed, if one of those furloughed men wishes to work at Little Rock and he met our requirements for employment, as his physical and mental and so forth, then he would have, if he came in and said I am a journeyman mechanic and you have upgraded apprentices working here, we would normally, if, as I say, he met our requirements, would employ him as a machinist and set back the junior apprentice.

The Court: Well, that is not quite our situation, Mr. Witness. Suppose we have, as in the case of Mr. Brooks, a man who has just completed his apprenticeship, he has not yet worked one day as a journeyman, hasn't worked one minute, completed his apprenticeship yesterday, or Saturday, say, this Monday morning he goes down to the Railroad office, the employment office, where ever it may be, and wants to work as a journeyman, there is no work there as a journeyman, but there is an apprentice over there who is doing a journeyman's work. Does this man Brooks, who has just completed his apprenticeship and who has not yet worked one minute as a journeyman for the Railroad, have the right to displace that man who has [fol. 51] been upgraded and go to work, that is does he have a contract right to work for the Railroad, assuming he meets the mental and physical requirements, or at that point can the Railroad say to him, Mr. Brooks, if we wanted you to work for us you would be entitled to that job, but we do not choose to employ you this morning, we do not care for the color of your hair or some other completely irrelevant and arbitrary reason given? The question is: Does Mr. Brooks have the right to work for the Railroad at that point? Now, everybody has touched on

that and gone around it, but you have not said squarely whether he does or does not?

The Witness: Mr. Brooks, when he graduates from his apprenticeship and gets his certificate, is a machinist at that time, and he would be treated the same as anyone else who is a machinist, whether he had served no time or twenty years.

The Court: I don't believe that quite answers the question.

The Witness: The difficulty, and the thing I am trying to skirt, is that we have a right to upgrade machinists when there is a shortage of—we have a right to upgrade apprentices when there is a shortage of machinists when it can be demonstrated that there is a machinist, a mechanic who wants the job, then we no longer have a right to upgrade the man in preference to hiring the machinist.

The Court: Well, now, I'm not talking about your right to upgrade; I am talking about your obligation to employ a particular individual. Once an apprentice has completed his apprenticeship, if there is work available and if he meets the physical and mental requirements, is the Railroad obliged to employ him if he wants to work, even though he has not one minute seniority?

The Witness: I would say yes.

The Court: Anything else from this witness?

Mr. Allin: Yes, Sir, Your Honor.

Q. Would your answer be the same before January 1, 1956? A. Yes, it would, even though he had no seniority any place as a journeyman before January 1, 1956, still he would be a finished mechanic, he would be considered a mechanic and would be entitled to consideration.

[fol. 52] The Court: Mr. Light, are these obligations of the employer covered by the rules and agreements to which you have referred, the orange bound booklet?

Mr. Allin: I don't think so, Your Honor. In my judgment it doesn't.

The Witness: I think I can answer it in this way: We did have an upgrading agreement during the war times, which perhaps would cover this situation, but that agreement is now canceled, and you do not have any written agreement now in existence which would touch directly on this point.

Mr. Light: Let me ask this, Mr. Armstrong, to make sure—

The Court: Well, if that is true, what is the basis for your saying that the Railroad would be required to employ this man, if there is no contract, no agreement that requires you to employ him, why couldn't they say to Mr. Brooks: We just don't want to employ you this morning?

The Witness: I can only say it in what appears to be a negative way. We could upgrade the apprentice only if there is a shortage of machinists. When the man walks in and says I am a machinist and want to go to work, then we lose the right to upgrade the man.

The Court: So, what you are saying is that you have a choice either between not upgrading or employing the applicant?

The Witness: That's correct.

The Court: Anything else?

Mr. Light: Yes, sir, I am a little confused at this stage.

Re-Direct Examination.

Questions by Mr. Light:

Q. Assuming, as we have, that Mr. Brooks had not gone into military service and had completed his apprenticeship in Monroe on November 3, 1955, and then had come to Little Rock, and that we found a situation here in Little Rock at that time when upgraded machinists were working as machinists, now, could Mr. Brooks "bump", or what ever the other proper term is, as a matter of right, contract right, one of those upgraded apprentice machinists that was doing a machinist's work here in [fol. 53] Little Rock, coming from Monroe? A. I have to state it in the same way I stated it before, which appeared to be in a negative way, that we could upgrade the apprentices only if there is a shortage of mechanics, and if Mr. Brooks came to Little Rock in November 3, 1955, and we had upgraded apprentices working at that point and if he met our employment standards then we would either have to employ him or we would not be able to upgrade.

Q. You would have to reduce this man back?

The Court: You would have to employ him or no one?

The Witness: Or not upgrade anyone, because when he comes into Little Rock and says I am a machinist and want work, then we can no longer contend that there is a shortage of machinists, at least as to that one job.

Q. But before January 1, 1956, he had no right to insist on being employed, you didn't have to employ him; he may have caused some repercussions on what else you did, but he still could not insist as a matter of contract on employment? A. He had no seniority as a machinist, so he did not have a right based on seniority to employment; he was a machinist and he had the same right that any machinist would have to employment under those circumstances.

Mr. Light: Your Honor, would it be possible to have about a five minute recess?

The Court: I think it would be an excellent idea. Court will be in recess ten minutes.

(Short recess.)

The Court: Anything further, Mr. Light?

Mr. Light: I have no further questions of this witness.

The Court: May I ask him one?

Mr. Light: Certainly.

The Court: Mr. Witness, suppose again that on December 30, 1955, assuming that to be a working day, or any day in December, 1955, there showed up at the employment office of the Missouri Pacific in North Little Rock two men who had just completed their training as apprentices, one from Monroe, Louisiana, and one from Texarkana, how would you decide which one to employ if you had one job?

[fol. 54] The Witness: We would, just to keep it straight for the purpose of these railroad people, we have no employees at Texarkana.

The Court: Well, make it Osawatomie then?

The Witness: Osawatomie, we would try to determine which was the better employee. I might say that that is not my duty to employ apprentices, so I am trying to tell you what would have been done in practice, but—

The Court: Would it have been done on the basis of seniority?

The Witness: No, not necessarily.

The Court: If the same thing had happened in 1961, June, 1961, would the employment selection have been made on the basis of seniority as between the same two men?

The Witness: When the apprentice came out at his time, at that time, which, of course, is subsequent to the January 1, '56 agreement, he would automatically have obtained a seniority date as a machinist at his home point. Since the two men would have seniority then we would have recognized the man with the earlier date as the one entitled to go to work.

The Court: Even though he had no seniority at this point, at North Little Rock?

The Witness: That is correct. Now, you have to assume in your hypothetical situation that neither man could work at his home point.

The Court: Very well. Anything else from this witness?

Mr. Mott: Yes, sir, please.

Re-Cross-Examination.

Q. Mr. Armstrong, for the purpose of the record, is it not true that the apprentice's time is based on hours; in other words, there is approximately so many days required to serve as an apprentice and that is actually broken down in hours, if he starts at 10:00 o'clock it has to be completed a full day? A. At some points, and on some railroads, time was counted on an hourly basis, but to my knowledge on the part of the Missouri Pacific that we are talking about here today we count time only in terms of whole days, either a day was counted or it was not counted.

[fol. 55] Q. And a man does not as a matter of practice in the Little Rock office make any distinction between the duties that he performs as an apprentice and that at which he was performing as a journeyman because it is continuous? A. Oh, yes, very definitely there is a difference.

Q. In what respect? A. When an apprentice is working he must work with a mechanic.

Q. At what point of his training? A. At all points of his training. Now—

Q. Do you know that as a fact? A. To the best of my knowledge.

Q. All apprentices during their entire term of apprenticeship work as an assistant or under supervision of and directly with a journeyman? A. Yes; but let me make sure that you are not getting into this complication, when—

Q. If I may, is it not true that after two years of training as a matter of practice and fact most apprentices work alone under the general supervision of the foreman or some one else of authority? A. Not to my knowledge.

Q. You say not to your knowledge, what would be your knowledge, do you know whether they do or do not, are you qualified to— A. I have never been in a shop and have never—I mean I have never worked in a shop and never been intimately acquainted with it.

Q. Do you know whether or not they work with some one directly, indirectly, remotely or otherwise? A. To my knowledge the apprentice must work with and under the direction of a mechanic.

Q. Now, are you making any distinction between a normal apprentice and an upgrade apprentice? A. Yes, I am.

Q. In what manner? A. The remarks I made, and this is the point I was going to try to clarify before you interrupted me. The remarks I have been making apply to the apprentice when he is going through his normal training and has not been upgraded. Now, when you have a shortage of machinists and you need a man to do machinist work on his own, not in connection with some other mechanic, then you, then we had a right to upgrade apprentices under those war time contracts, and he could [fol. 56] work by himself, and we paid him the mechanics' rate as the price of our right to so work the man.

Q. Let's be specific; a man that is upgraded working as an apprentice—he wouldn't be working as an apprentice if he is upgraded—an apprentice by category, according to your records, working as an upgraded apprentice he would be doing journeyman's duties and not be under

the supervision of a journeyman; is that true? A. We could so work him, yes.

Q. All right, now, assuming one step further, at some point while that upgraded apprentice was performing those journeyman duties if his apprenticeship terminated for the reason that he completed it he would then continue on the same duties as a journeyman as a matter of practice and custom in the North Little Rock shop; is that true, yes or no? A. When he completes his apprentice training—

Q. Yes or no, please? A. I can't answer it accurately with a yes or no answer.

Q. Is it or not the custom and practice? A. The difficulty I run into in this: When the—

Q. Mr. Armstrong—

The Court: Let him explain it.

The Witness: When the apprentice completes his time and his status changes from upgraded apprentice to mechanic he then becomes a junior mechanic on the seniority roster, and then his seniority right to jobs available changes and he very well could move to a different job in the shop, but it is true, and perhaps this is the point you're getting at, if an apprentice is upgraded he is upgraded because there is a shortage of mechanics and that shortage would continue through the time that he completes his apprentice training, and since we have said there is a shortage of mechanics we would undoubtedly employ him as a mechanic and he would continue to work in the shop. Now, the particular job he might work on might change because of the change in his status.

Q. You undoubtedly would employ him? A. He would be upgraded only because there was a shortage of mechanics, machinists.

The Court: I think the answer is clear; let's move along. Anything else?

[fol. 57] Mr. Mott: I think that is all.

With the Court's consent, notwithstanding we have a request to minimize the record, I would like to introduce, and, if necessary, have this witness identify these memorandums and items which are relative to the question involved in determination of the seniority.

The Court: Have you shown them to opposing counsel?

Mr. Light: I have no objection. I would like for him to identify it.

Q. Mr. Armstrong, I present a letter addressed to G. O. Hawley, I wish you would identify the purported signature, the purported individual who signed that as a letter agreement? A. It appears at the end of the letter this: "Yours truly", and then typed in "T. Short, Chief Personnel Officer". Mr. Short was the Chief Personnel Officer on January 12, '56, when this document is dated.

Q. Do you know of that document of your personal knowledge as an agreement executed by the parties who purportedly signed it? A. Yes, I am familiar with this letter.

Q. Would you say it is an accurate copy of the original document? A. I think it is, yes.

The Court: You want to have it admitted in evidence?

Mr. Mott: Yes, sir.

The Court: Do you propose to give it a number?

Mr. Mott: If I may, Your Honor. Since these are already tacked I would like to introduce the memorandum of 1945, which was previously mentioned, as Exhibit "A", the system agreement, collective bargaining agreement, I think it has been referred to here, which was effective from 1949 through and including the dates involved in this litigation as Exhibit "B", and Exhibit "C" the letter agreement which was previously mentioned by the witness as Exhibit "C".

(Thereupon, the documents above referred to were marked Plaintiff's Exhibits A, B and C, for identification.)

The Court: What is the date of it, January 12, 1956?

Mr. Mott: That is right.

The Court: Let them be received.

[fol. 58] (Thereupon, the documents heretofore marked Plaintiff's Exhibits A, B and C, for identification, were received in evidence.)

Mr. Mott: I think that is all.

Mr. Light: No further questions.

The Court: Any further testimony from either side?

Mr. Light: Your Honor, will we have opportunity to submit briefs?

The foregoing to remain in effect until changed or canceled as provided in the Railway Labor Act as amended.

For the Missouri Pacific Railroad:

(signed) O. A. Garber,
Chief Mechanical Officer

(signed) H. E. Roll,
Chief Personnel Officer

[fol. 60] For the Employees:

(signed) J. A. Keller,
International Association-Machinists,

(signed) O. E. Clark,
International Brotherhood Bailermakers
I.S.B. & Helpers,

(signed) M. McClymont,
Int. Brotherhood of Blacksmiths,

(signed) G. O. Hawley,
Int. Brotherhood Electrical Workers,

(signed) R. M. Chute,
Sheet Metal Workers Int. Assn.,

(signed) J. J. Byrne,
Brotherhood Railway Carmen of America.

NOTE.

Plaintiff's Exhibit B was a printed booklet styled Agreement Between the Missouri Pacific Railroad Company and System Federation No. 2 Railway Employes' Department A.F. of L. Mechanical Section Thereof, and Effective September 1, 1949. At the suggestion of the Court at the trial, and by agreement of counsel, each party designated only certain portions of that Exhibit, and an amendment thereto, for inclusion in the Record. The portions so designated follow:

[fol. 61]

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

PLAINTIFF'S EXHIBIT B.

AGREEMENT

Between the

MISSOURI PACIFIC RAILROAD COMPANY

and

System Federation No. 2

RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.

RULE 15—SENIORITY TRANSFERS:

Employes transferred from one point or seniority subdivision to another with a view to accepting a permanent transfer, will, after thirty days, lose their seniority at the point they left, and their seniority at the point to which transferred will begin on date of transfer, seniority to govern. Employes will not be compelled to accept a permanent transfer to another point or seniority subdivision.

RULE 23—TRANSFERRING MEN WHO HAVE BEEN LAID OFF:

(a) While forces are reduced, if men are needed at any other point, such men as are laid off by reason of force reduction will be given preference to transfer with privilege of returning to home station when force is increased, such transfer to be made without expense to the company. Seniority to govern all cases.

(b) Employes transferred under this rule shall acquire seniority at the point to which transferred from the date they commence work thereat, such seniority so established shall be forfeited when released at that point for any cause.

(c) Men now as of the effective date of this agreement, viz., February 1, 1939, employed at points other

than home point will retain home point seniority and seniority at point now employed until such time as they are called back to home point.

[fol. 62] RULE 25—SENIORITY:

(a) Seniority of employes in each craft covered by this agreement shall be confined to the point and seniority subdivision employed.

* * *

(e) The seniority of employes will date from the time pay starts when employed or re-employed.

Seniority between two or more men who are employed and commenced work at the same time will be determined by the order in which their applications were received.

(f) When changes in engine terminals or engine runs at any point results in reduction in force, employes displaced thereby may exercise their seniority at the point to which such work is transferred to the extent only that force is increased to take care of such transferred work.

Whenever abolished shops or roundhouses are re-established, men laid off will be called back as per Rule 21.

RULE 37—MISCELLANEOUS APPRENTICE RULES:

(a) The ratio of apprentices in their respective crafts shall not be more than one to every five mechanics.

(b) The distribution of apprentices among shops where general repairs are made shall be as nearly as possible in proportion to the mechanics in the respective trades employed in such back shops.

(c) If within the first period of training an apprentice shows no aptitude to learn the trade, he will not be retained as an apprentice.

(d) An apprentice shall not be dismissed or leave the service of his own accord, except for just and sufficient cause, before completing his apprenticeship.

(e) If an apprentice is retained in the service upon completing the apprenticeship, his seniority rights as a mechanic will date from the time of completion of apprenticeship. (As this Rule appeared prior to January 1, 1956.)

[fol. 63] (f) Preference will be given to sons of employes in the selection of apprentices to the extent of at least eighty (80) percent of the number employed.

(g) Two apprentices shall not be assigned to work together as partners.

(h) Apprentices shall not be assigned to work on night shifts or on Sundays and holidays.

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

PLAINTIFF'S EXHIBIT C.

MISSOURI PACIFIC LINES
St. Louis 3, Missouri

January 12, 1956

VJ-S 43367-TT-1
cy 360-2014

Mr. G. O. Hawley, President
Mr. O. E. Clark, Secretary
System Federation No. 2
408 York Hotel
St. Louis 2, Missouri

Gentlemen:

On January 11, 1956, the Carrier entered into an agreement, effective January 1, 1956, with System Federation No. 2, Railway Employes' Department, A. F. of L. and the General Chairmen of the six Shop Craft Organizations comprising System Federation No. 2, revising paragraph (e) of Rule 37 of the Shop Crafts Agreement, effective September 1, 1949, to read as follows:

"Upon the completion of his apprenticeship at any point, an apprentice will automatically establish sen-

iority as a journeyman mechanic in his respective craft at such point, which will date from the time of completion of apprenticeship."

[fol. 64] During the negotiation of the agreement referred to above, it was recognized by all parties concerned that employees who serve in the armed forces of the United States have certain rights guaranteed to them under the provisions of federal laws and it is not the intention to interfere with such rights as veterans may have under such legislation.

It was also recognized that the Memorandum of Agreement between Missouri Pacific Railroad and System Federation No. 2, Railway Employes' Department, A. F. of L. dated at St. Louis, Mo. on December 4, 1946, which provides that—

> "An apprentice who has entered military service and upon completion of such service returns to the railroad in accordance with the law and resumes his training as an apprentice, will, upon completion of his apprenticeship, be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service."

will not be cancelled or superseded by the revision of Rule 37(e).

If we have correctly set forth the understanding reached in conference, it will be appreciated if you will so indicate by affixing your signatures in the spaces provided hereon and return the first hard copy of this letter for our files.

Yours truly,

/s/ T. Short
Chief Personnel Officer

/s/ G. O. Hawley
President, System Federation No. 2

/s/ O. E. Clark
Secretary, System Federation No. 2

/s/ J. C. Terhune, Jr.
General Chairman, I.A. of M.

/s/ O. E. Clark
General Chairman, I.B. of B.I.S.B.&H. of A.

[fol. 65] /s/ O. E. Clark
General Chairman, I.B. of B., D.F. & H.

/s/ R. E. Martin
General Chairman, S.M.W.I.A.

/s/ G. O. Hawley
General Chairman, I.B. of E.W.

/s/ W. H. Bond
General Chairman, B.R.C. of A.

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

MEMORANDUM AGREEMENT

Between

GUY A. THOMPSON, TRUSTEE,
MISSOURI PACIFIC RAILROAD COMPANY, DEBTOR

and

RAILWAY EMPLOYES' DEPARTMENT, A. F. of L.

Composed of:

INTERNATIONAL ASSOCIATION OF MACHINISTS
INTERNATIONAL BROTHERHOOD OF
BOILERMAKERS, IRON SHIP BUILDERS
AND HELPERS OF AMERICA
INTERNATIONAL BROTHERHOOD OF
BLACKSMITHS, DROP FORGERS AND
HELPERS
SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS
BROTHERHOOD RAILWAY CARMEN OF AMERICA

* * *

In order to enable apprentices to establish and accumulate seniority in their respective crafts from the time of completion of the apprenticeship, it is mutually agreed that paragraph (e) of Rule 37 of the Agreement between the parties hereto is hereby cancelled and the following substituted therefor:

[fol. 66] Upon the completion of his apprenticeship at any point, an apprentice will automatically establish seniority as a journeyman mechanic in his respective craft at such point, which will date from the time of completion of apprenticeship.

This Agreement shall become effective January 1, 1956, and remain in effect until changed or cancelled in ac-

cordance with the provisions of the Railway Labor Act, as amended.

Signed at St. Louis, Missouri, this 11th day of January, 1956.

For the Carrier:

Guy A. Thompson, Trustee,
Missouri Pacific Railroad Company,
Debtor

/s/ T. Short
Chief Personnel Officer

Accepted for the
System Federation No. 2,
Railway Employes' Department,
A. F. of L.:

/s/ G. O. Hawley
President, System Federation No. 2

/s/ O. E. Clark
Secretary, System Federation No. 2

/s/ J. C. Terhune,
General Chairman, I.A. of M.

/s/ O. E. Clark
General Chairman, I.B. of B.I.S.B.&H. of A.

/s/ O. E. Clark
General Chairman, I.B. of B., D.F. & H.

/s/ R. E. Martin
General Chairman, S.M.W.I.A.

/s/ G. O. Hawley
General Chairman, I.B. of E.W.

/s/ W. H. Bond
General Chairman, B.R.C. of A.

[fol. 67]

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

MEMORANDUM OPINION—December 18, 1961

Plaintiff, Robert C. Brooks, has brought this action against the defendant, Missouri Pacific Railroad Company, to enforce certain claimed retroactive seniority rights as a machinist in the employ of defendant. Plaintiff's claim is based upon the re-employment provisions of the Universal Military Training & Service Act, 50 U.S.C.A., § 459, as amended,[1] and upon the collective bargaining agreement in force at all pertinent times between the railroad and System Federation No. 2, Railway Employees' Department, A.F. of L. The cause has been tried to the Court and submitted on written briefs. This memorandum incorporates the Court's findings of fact and conclusions of law.

On July 5, 1951, plaintiff was employed by defendant as an apprentice machinist at its Monroe, Louisiana, shops. The apprentice working course is normally completed in 1040 working days, and in addition an apprentice is required to complete satisfactorily a correspondence course furnished by defendant.

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[1] Insofar as here pertinent section 459(a) and 459(b)(B)(i) provide in substance that where an employee of a private employer is inducted into the armed services and satisfactorily completes his period of training and service, and receives a certificate to that effect, such employee is entitled to re-employment, provided that he is still qualified to perform the duties of his employment and makes timely application for such re-employment. The reinstatement of such employee shall be to the same position held by him formerly or to some other position with "like seniority, status and pay." Further, any person who is so restored to his former position shall be deemed to have been on furlough or leave of absence during the period of his military training and service, and his restoration shall be without loss of seniority. 50 U.S.C.A. App. §459(c)(1). Section 459(d) vests jurisdiction in the district courts of the United States to entertain suits brought to enforce re-employment rights of returned service men, and provides that the United States Attorneys may represent them in such suits. Plaintiff has such representation in this case.

[fol. 68] At the time of plaintiff's employment there was in effect between the railroad and the Union a collective bargaining agreement which had become effective on September 1, 1949, and which apparently superseded an earlier agreement. Rule 37 of the agreement in force at the time plaintiff was hired provided that the ratio of apprentices in their respective crafts should not be more than one apprentice to every five machinists; and that if within the "first period of training" [2] an apprentice showed no aptitude for the trade, he would not be retained in employment, but that an apprentice should not be dismissed from service during his apprenticeship without just cause. Rule 37(e) provided specifically that if an employee was retained in service after completing his apprenticeship, his seniority rights as a mechanic would date from the time of the completion of the apprenticeship.

Prior to plaintiff's employment and in December, 1945, when the problem of veteran's re-employment rights had become urgent, the railroad and the Union had entered into a "Memorandum of Understanding" which recognized that under the law an employee returning from military service would be entitled to be restored to the position to which his accumulated seniority, including time spent in military service, would have entitled him and which he would have occupied had he not gone into service. With specific reference to apprentices, this memorandum provided that one who entered the military service and resumed his apprenticeship upon completion of that service would be accorded seniority as of the date upon which the apprenticeship would have been completed had the apprentice remained continuously in the railroad's service.

Before completing his apprenticeship plaintiff was inducted into the military service on January 24, 1952. He was honorably discharged on November 11, 1953, thereafter applied for re-instatement as an apprentice, and was restored to duty at Monroe on November 23, 1953.

[fol. 69] On April 29, 1954, plaintiff was laid off due to a reduction in force at Monroe. On July 6, 1954, plaintiff

[2] The materials before the Court indicate that the 1040 days of apprenticeship were divided into eight training periods of 130 days each.

was called by defendant to work as an apprentice [3] in its St. Louis shops, where he continued his training until July, 1955, when he was transferred, at his own request, to defendant's North Little Rock shops. Plaintiff completed his training as an apprentice on January 23, 1958, and he was immediately hired as a journeyman mechanic or machinist at North Little Rock.

The record discloses that mechanics in the employ of the defendant do not have system-wide seniority. Rather, such an employee has seniority in one particular shop, a system that is called "point seniority." [4] Due to the shift by the railroads in recent years from steam to diesel powered locomotives, which latter type locomotives require less maintenance and service than the former, defendant's need for mechanics has been reduced very drastically and more so in some shops than in others. Hence, a mechanic's point of seniority can be as important as his seniority date or even more so. It is the importance of the point of seniority to a mechanic which has given rise to the instant controversy.

[fol. 70] It will have been observed that while Rule 37 (e), as it appeared in the 1949 agreement, provided that a mechanic's seniority as such should begin upon the completion of his apprenticeship, said rule had nothing to say about the mechanic's point of seniority. Probably

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[3] Rule 21(e) of the collective bargaining agreement provided that in connection with reductions in force the ratio of apprentices would be maintained. Rule 23 provided that men laid off by reason of reduction in force should be given preference for work available in other shops, and the right to transfer to such shops with the privilege of returning to their home stations when forces at such stations should be increased. It was further provided that upon such transfer the employee involved would establish seniority at the transfer point, but that such seniority at that point would end when the employee was released from employment at the transfer point.

[4] In this opinion the Court will have occasion to use the phrases "seniority point" or "point of seniority." Those phrases refer to the particular shop in which a given employee has seniority at a given time. Ordinarily, and subject to certain qualifications not here material, an employee who transfers from one shop to another loses seniority in the shop from which he transfers.

in 1949, and indeed for some years thereafter, there was no real need for the contract to deal specifically with points of seniority because normally an apprentice would complete his training in the same shop in which he began it and would be employed in that shop, thus fixing his initial seniority point. Therefore, it can be said that from a practical standpoint a machinist's initial point of seniorty was the shop in which he completed his training. In 1956, while plaintiff was employed at North Little Rock, the text of Rule 37(e) was amended so as to provide that an apprentice's seniority as a machinist would be as of the date of the completion of his training and in the shop in which he was employed when his training was completed. In connection with the 1956 amendment to Rule 37(e) it was specifically recognized that the 1945 memorandum of understanding, which has been mentioned, was to remain in full force and effect and was not modified by the amendment.

Although the amendment to Rule 37(e) spelled out a mechanic's initial point of seniority, and although that amendment referred to the 1945 memorandum which accorded retroactive seniority to apprentices returning from military service, the amendment for some reason was silent as to whether such an apprentice's seniority in the shop where he completed his training would be retroactive in that shop. The failure of the railroad and the Union to deal specifically with the problem of the seniority point of apprentices who have completed their training after a period of military service and who are entitled to retroactive seniority under the 1945 understanding has in instances created problems with which the railroad and Union have undertaken to deal by construing the collective bargaining agreement, including the 1945 understanding and the 1956 amendment to Rule 37(e), to mean that an apprentice so situated is to be given either retroactive seniority in the shop where he commenced his training, [fol. 71] regardless of where he completed it, or non-retroactive seniority in the shop where he completed his training, regardless of where he commenced it. This construction causes no difficulty where the apprentice in question upon his return from service completes his training in the same shop in which he was first employed, but it can cause

difficulty where the apprentice starts his training in one shop and completes it in another, and where the second shop is a more advantageous seniority point than the first.

When plaintiff completed his apprenticeship and was hired as a mechanic in 1958, the railroad accorded him seniority as of that date in the North Little Rock shops. This was in accord with Rule 37(e) as amended, but without regard to any retroactive seniority. While plaintiff accepted the employment at North Little Rock and has worked in the shop there since that time, he protested the fact that he had not been allowed retroactive seniority. The railroad thereupon indicated a willingness to allow him such seniority but with Monroe as his seniority point.

Plaintiff refused to accept that proposition since even with retroactive seniority he would not be able to work in the Monroe shop at this time and perhaps not for a number of years. The railroad's willingness to grant plaintiff retroactive seniority at Monroe appears to have been in accord with the construction which the railroad and the Union have placed upon the overall collective bargaining agreement.

Affairs having come to this state, the plaintiff commenced this action. It is the theory of plaintiff that he is entitled to retroactive seniority at North Little Rock, whereas defendant takes the position that if plaintiff is to have any retroactive seniority it must be at Monroe. It has been conceded that whether plaintiff's retroactive seniority point be North Little Rock of whether it be Monroe, his retroactive seniority date is November 3, 1955, which is the date upon which he would have completed his apprenticeship had he not been called into military service.

In resisting the claim of plaintiff, defendant attacks both the jurisdiction of the Court and the merits of the [fol. 72] claim. It is asserted by the railroad that as far as the Act is concerned the only right that plaintiff had upon his return to civilian life was to be restored to his position as an apprentice and given an opportunity to complete his training, whereupon, if he should be employed by defendant as a mechanic, he would get seniority as such in the shop where the training was completed and

as of the date of the completion. And the defendant argues that when plaintiff was put back to work as an apprentice and when he actually completed his course of training in 1958 and was hired in the North Little Rock shop and was given seniority as of the date of the completion of his training, plaintiff received everything that the Act required.

While defendant recognizes that plaintiff was entitled to retroactive seniority under the 1945 memorandum of understanding, it contends that the provision of that memorandum which gave returning apprentices retroactive seniority went further than was required by the statute, and that when plaintiff seeks to enforce those rights he is not suing under the statute but on a contract which gives him rights greater than those which the Act accords. From this premise defendant argues that since to grant plaintiff relief would require the Court to construe and apply a railroad collective bargaining agreement, the controversy is within the exclusive jurisdiction of the National Railway Adjustment Board created by section 3 of the Railway Labor Act, 45 U.S.C.A., § 153, and is beyond the jurisdiction of the Court.[5] See Slocum v. Delaware L. & W. R. Co., 339 U.S. 239.

On the merits, defendant repeats its contentions that under the Act plaintiff is not entitled to retroactive seniority at North Little Rock or at any other place, and that as far as the 1945 agreement is concerned, plaintiff is bound by the construction adopted by the railroad and the Union with respect to the overall collective bargaining agreement, including the 1945 memorandum, the 1949 [fol. 73] printed contract, and the 1956 amendment to Rule 37(e) of the 1949 agreement, under which construction plaintiff has a choice of having North Little Rock as a seniority point with a non-retroactive seniority date of November 23, 1958, or having Monroe as a seniority point with seniority retroactive to November 3, 1955.

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[5] This jurisdictional contention and the further contention that the complaint fails to state a claim upon which relief can be granted were first raised by motion to dismiss, on which motion the Court reserved its ruling.

Before discussing further the contentions of the parties it is well to point out what the reemployment provisions of the Act do and what they do not do. The purpose of section 459 is succinctly stated in subsection (c) (2) thereof:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Subsection (c) (2) has been construed frequently by the Courts. As so construed, it means that the returning veteran upon restoration to his job is to enjoy such status, pay, seniority, and promotions as would have accrued to him automatically had his employment not been interrupted by military service. No agreement between any employer and any collective bargaining agent nor any interpretation or application of an existing collective bargaining agreement which infringes upon the reemployment rights granted by the statute, or which discriminates against returning veterans, can be permitted to stand. On the other hand, the statute, while to be construed liberally, does not entitle a returning veteran to benefits or to status which he would not have enjoyed or received automatically had he remained constantly on the job. The veteran is not entitled to a windfall because he is a veteran, or to better treatement or more benefits than he would have received had he not gone into the service. And, as indicated, the veteran must show that the status [fol. 74] or seniority which he seeks under the Act would have accrued to him automatically had he remained in private employment. It is not sufficient for him to show merely that there was "high probability" that he would have obtained the status or seniority sought had it not been for his military service. McKinney v. Missouri, K. & T. R. Co., 357 U.S. 265; Diehl v. Lehigh Valley R. Co., 348 U.S. 960; Oakley v. Louisville & Nashville R. Co., 338

U.S. 278; Fishgold v. Sullivan Drydock & Repair Corporation, 328 U.S. 275; O'Hare v. United States, Ct. Cl., 288 F.2d 705; Horton v. United States Steel Corporation, 5 Cir., 286 F.2d 710; Rix v. Turnbull-Novak, Inc., 8 Cir., 160 F.2d 785; Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., 8 Cir., 259 F.2d 122; Bassett v. Texas & Pacific R. Co., 5 Cir., 258 F.2d 819.

I.

Concerning the challenge to the Court's jurisdiction, it is clear that to the extent that a railroad employee seeks to enforce rights guaranteed to him under the Act the federal courts have jurisdiction, notwithstanding the fact that to afford relief may require such courts to construe and apply a railroad collective bargaining agreement. In such a case there is no need for the employee to exhaust possible remedies available to him under the Railway Labor Act. McKinney v. Missouri, Kansas & Texas R. Co., supra.

On the other hand, the Court is willing to assume, for present purposes at least, that where the collective bargaining agreement grants to a returning veteran more rights than the Act itself accords him, an action brought by the veteran to enforce such additional rights may be considered as not "founded upon the statute," but to be: "based upon the contract," and thus perhaps beyond the jurisdiction of the Court.[6]

[6] Making jurisdiction depend upon the characterization of an action like this as "founded on the statute" on the one hand or "based upon the contract," on the other hand, creates some difficulty which is at least in part semantic. The difficulty arises from the fact that seniority, whether in the railroad industry or in some other industry, is essentially contractual, and the rights asserted under the Act must have their origin in a collective bargaining agreement. Hence, any suit to establish seniority rights is, in a sense, "based on" the underlying contract because in the absence of such a contract no such rights exist. In this connection it was pointed out in *McKinney* that the Act itself creates no rights of seniority and no seniority system. It simply recognizes such rights and systems as may exist by virtue of prior agreements, and requires an employer to restore a returned veteran to his employment and to grant such seniority under the agree-

[fol. 75] If, as defendant contends, the 1945 memorandum of understanding confers upon returning apprentices contractual rights over and above those granted by the underlying collective bargaining agreement, which rights the statute authorizes the federal courts to enforce, and over above those which the statute confers, and if plaintiff is basing his claim on the 1945 memorandum, then defendant's jurisdictional plea might well be meritorious. Cf. Delman v. Federal Products Corporation, 1 Cir., 251 F.2d 123. However, it does not appear that plaintiff now relies on the 1945 memorandum as giving him some special rights which he would not have had in the absence of such memorandum. In fact, when plaintiff amended his complaint, he deleted all reference to said memorandum and stated that one of the purposes of the amendment was to make such deletion. Hence, while plaintiff claims that he is entitled to what the 1945 memorandum says he is entitled to have, it now appears that he bases that claim on the statute, as applied to the basic collective bargaining agreement establishing a seniority system and seniority rights, and contends that under the Act defendant is required to give him retroactive seniority at North Little Rock.

With the case in this posture, the Court holds that it has jurisdiction of the cause, and defendant's plea to the contrary will be rejected.

[fol. 76] With the jurisdictional question thus disposed of, the case, on the merits, presents two questions: (1) whether under the Act plaintiff is entitled to retroactive seniority to be measured in point of time from the date he would have completed his apprenticeship but for his military service; (2) If so, then is plaintiff entitled to retroactive seniority at North Little Rock? Putting the second question in slightly different language, does the construction which has been adopted by the railroad and

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ment as he would have had, but for his military service. But, *McKinney* holds that a veteran suing to enforce his reemployment rights, including seniority, is doing more than merely suing on the contract. When he brings his action he asserts "special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the armed forces." (357 U.S. at p. 269).

the Union which would deny plaintiff retroactive seniority at North Little Rock, while offering it to him at Monroe, violate plaintiff's rights under the Act?

II.

In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.

It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been "highly probable" that the status in question would have been acquired at a time earlier than it was. McKinney v. Missouri, Kansas & Texas R. Co., supra; Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., [fol. 77] supra; Bassett v. Texas & Pacific R. Co., supra; Addison v. Tennessee Coal, Iron & Railroad Co., 5 Cir., 204 F.2d 340. See also the unreported opinions of the United States District Court for the Eastern Division of the Eastern District of Missouri in the cases of Cross v. Thompson, Trustee, Docket No. 8083(3), decided in 1954, and Tilton et al. v. Missouri Pacific R. Co., Docket Nos. 59C 301(2), 59C 302(2), and 59C 303(2), decided in 1959.

Although defendant earnestly contends that the authorities just cited govern and establish that plaintiff is not entitled to retroactive seniority under the Act, the record here discloses that plaintiff had a contractual right under the basic agreement to complete his apprenticeship, that he would have completed the same in 1955 had he not been called into military service, and that had he completed it at that time he would, in point of practice, have been hired automatically as a journeyman machinist with seniority as of the date of completion of his apprenticeship. In 1955 there was a shortage of mechanics in the North Little Rock shops, apprentice mechanics were being temporarily upgraded to mechanics' status, and upon the completion of their training as mechanics, they were instantaneously employed as full fledged journeyman mechanics. While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic.

In the Court's view the factual elements present in the instant case serve to distinguish it from the cases relied upon by the defendant, and the Court holds that in the circumstances defendant was required to grant retroactive seniority to plaintiff when he completed his training and was employed as a mechanic. Cf. McNichols v. Southern Railway Co., E.D. Ky., 194 F. Supp. 148.

III.

There remains for consideration the question of whether plaintiff is entitled to retroactive seniority at North [fol. 78] Little Rock. In arguing that he is not so entitled the railroad contends that the collective bargaining agreement is ambiguous as to retroactive seniority points, and that the construction placed upon the agreement by the railroad and the Union is permissible and binding upon plaintiff. It is further argued that it has not been established with the requisite certainty that plaintiff would have completed his apprenticeship in North Little Rock had he not been required to enter the armed forces.

The construction of the agreement invoked by the railroad gives the Court no problem as it applies to cases in which the apprentices in question would have completed their training in the same shops where such training was begun, which is the normal course of events. In such a case the returned service man gets exactly the same seniority date and exactly the same seniority point as he would have obtained had he remained constantly on the job throughout his apprenticeship. The Act does not entitle an apprentice to a more advantageous point of seniority than he would have had had he never entered the military service, or because he completed his training in a busier shop than the one in which he was employed prior to his service and in which he would ordinarily have completed his training had he been left undisturbed.

However, this is not such a case. In no event would plaintiff have completed his training at Monroe. The parties have agreed that plaintiff's retroactive seniority date is November 3, 1955, and long before that time plaintiff had been cut off at Monroe and would have been cut off there even if he had not gone into service. He would have been required to complete his training in some other shop, and on November 3, 1955, when training would have been completed plaintiff actually was employed at North Little Rock.

In such circumstances the attempt of the defendant and the Union to fix plaintiff's retroactive seniority at Monroe clearly violates the Act since it does not restore plaintiff to the same status in point of seniority he would have occupied but for his military service. Indeed, seniority at Monroe would be entirely unrealistic, and in fact meaningless, since there has been no work for plaintiff at Monroe at any time subsequent to his lay-off there in 1954.

[fol. 79]

Having determined that Monroe is not to be considered as plaintiff's retroactive seniority point, it seems clear that such point must be North Little Rock, as plaintiff contends. In reaching this conclusion the Court does not speculate on whether had plaintiff not gone into military service he would have moved from Monroe to St. Louis and thence to North Little Rock, as in fact he did follow-

ing his military service. In a case of this kind a veteran should not be required to prove, and indeed cannot prove, what course his life would have taken but for his military service. Had plaintiff not been inducted, he might have tired of railroad work altogether, or he might have shifted to some other line, or applied for a transfer to some point other than North Little Rock.

But it is not speculative to say that in no event would plaintiff have completed his apprenticeship at Monroe, that he did complete it at North Little Rock in 1958, and would have completed it in 1955 but for his military service, and that as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics. Since the Court has concluded that under the Act plaintiff is entitled to retroactive seniority, it follows in the circumstances that his retroactive seniority point should be at North Little Rock. See McNichols v. Southern Railway Co., E.D. Ky., supra. In so holding the Court believes it is awarding plaintiff nothing to which he is not entitled under the Act. To hold otherwise would be to give him substantially less than the Act requires and would be, in fact, to give him nothing.

Judgment will be entered directing the defendant to accord plaintiff a retroactive seniority date of November 3, 1955, and fix his retroactive seniority point at North Little Rock. Counsel for plaintiff may submit a precedent for judgment after first obtaining opposing counsel's approval as to form and verbiage.

[fol. 80] Dated this 18 day of December, 1961.

/s/ J. Smith Henley,
United States District Judge.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

ORDER AND JUDGMENT—filed February 5, 1962

In accordance with the memorandum opinion dated December 18, 1961, judgment is entered directing the defendant to accord a retroactive seniority date of November 3, 1955, to the plaintiff, Robert C. Brooks, and to fix his retroactive seniority point on this date at North Little Rock, Arkansas, all of which is based upon the findings of the memorandum opinion and conclusions therein adopted.

If notice of appeal is filed herein by the defendant, this Order and Judgment is stayed pending disposition of the appeal or further order of this court; otherwise, this order and judgment shall be effective upon the expiration of thirty days from its entry.

/s/ J. Smith Henley,
United States District Judge

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

NOTICE OF APPEAL AND DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

NOTICE OF APPEAL—filed February 9, 1962

Defendant hereby appeals to the United States Court of Appeals for the Eighth Circuit from the Order and Judgment entered herein by the District Court on February 5, 1962, based on the Memorandum Opinion filed herein on December 18, 1961.

[fol. 81]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—
filed February 9, 1962

Defendant designates for inclusion in the Record on appeal the entire Record, all proceedings and all evidence adduced in the District Court.

This 8th day of February, 1962.

Pat Mehaffy and
Robert V. Light,

By /s/ Robert J. Light,
1100 Boyle Building,
Little Rock, Arkansas,

Attorneys for Defendant.

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

No. LR 60 C-124

[Title Omitted]

RELEVANT DOCKET ENTRIES.

Sept. 20, 1960 — Complaint filed.
Nov. 1, " — Motion to Dismiss and Answer of Defendant filed, with certificate of service. Explanatory letter of defense counsel that Motion is filed under Rule 12 of F.R.C.P.
Dec. 7, " — Order filed, reserving ruling on motion, pending consideration of case on merits.
Mar. 22, 1961 — Amended Complaint filed.
Apr. 4, " — Motion to Dismiss and Answer of Defendant with Reference to Amended Complaint filed.

[fol. 82]

Sept. 18, " — Trial to Court before Henley, Judge. Counsel requested permission to file simultaneous briefs. Briefing schedule set up.

Dec. 18, " — Memorandum Opinion filed, directing counsel to submit precedent for judgment, according plaintiff retroactive seniority to November 3, 1955, and fixing seniority point at North Little Rock, Arkansas.

Feb. 5, " — Order and Judgment filed, pursuant to memorandum opinion, staying order and judgment if Notice of Appeal be filed, otherwise, to be effective upon the expiration of thirty days from its entry.

" 9, " — Notice of Appeal and Designation of Contents of Record on Appeal filed by defendant. Copy mailed United States Attorney by Clerk.

" 9, " — Bond for Cost of Appeal filed.

Mar. 14, " — Notice of Appeal and Docket Entries mailed to Clerk of Court of Appeals.

* * * *

[Clerk's certificate to foregoing paper omitted in printing]

[fol. 83]

IN UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,019.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT

v.

ROBERT C. BROOKS, APPELLEE

Appeal from the United States District Court for the Eastern District of Arkansas.

OPINION—October 11, 1962.

Before VOGEL and VAN OOSTERHOUT, Circuit Judges, and VAN PELT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Brooks, a veteran, brought this action under the Universal Military Training and Service Act of June 24, 1948, 50 U.S.C.A. § 459, to establish retroactive seniority rights as a machinist at defendant's North Little Rock shops. The trial court upheld plaintiff's contention and granted him retroactive seniority. This timely appeal by defendant followed.

Brooks entered into defendant's employment as an apprentice machinist at its Monroe, Louisiana, shops on July 5, 1951, continuing in such capacity until his induction [fol. 84] into military service on January 24, 1952. He was honorably discharged on November 7, 1953, and upon his application he was restored to duty as an apprentice machinist at Monroe on November 23, 1953. On April 29, 1954, Brooks was laid off due to a reduction in work

force. On July 6, 1954, he resumed his apprenticeship at defendant's shops at St. Louis, Missouri, where he remained until July 25, 1955, when upon his request he was granted a transfer to defendant's North Little Rock shops. Plaintiff completed the required 1040 days of apprenticeship at the North Little Rock shops on January 23, 1958, and was immediately thereafter employed as a journeyman machinist and was assigned his seniority as such at North Little Rock on January 23, 1958.

Plaintiff was offered a retroactive seniority date of November 3, 1955, at Monroe upon the basis of defendant's interpretation of a 1945 memorandum of understanding between defendant and the union.[1]

Under the basic contract between the defendant and the union, an employee, subject to certain exceptions not here applicable, obtained seniority only at the point of his employment. Plaintiff rejected the offer of seniority at Monroe as there was no employment opportunity available there because of work changes brought about by the transition from steam to diesel locomotives.

The parties stipulated that *if* Brooks is entitled to retroactive seniority as a journeyman machinist at North Lit-
[fol. 85] tle Rock, the date would be November 3, 1955. Defendant made clear that the emphasis is on the word "*if*" and that it was denying Brooks had any right to retroactive seniority at North Little Rock. The applicable 1949 contract between the defendant and the union, of which plaintiff was a member, required an apprentice mechanic to serve in such capacity for 1040 days and in addition to satisfactorily complete a correspondence course furnished by the defendant. Such course consisted of two lessons per month. An examination was required as to each lesson. The passing grade was 75%.

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[1] Plaintiff in his original complaint has asserted rights upon the basis of a 1945 memorandum of understanding between defendant and the union. After defendant had filed a motion to dismiss upon the ground that the court had no jurisdiction to grant relief beyond that founded upon the statute, Brooks, by amendment specifically stating his intention so to do, withdrew the assertion of his complaint based upon the 1945 memorandum. The trial court held such issue was withdrawn and plaintiff has taken no appeal from such holding, nor has he asserted error with respect thereto in his brief.

Plaintiff concedes that actual service of 1040 days as an apprentice is a prerequisite to his attaining journeyman status. His contention is that since he actually served such apprenticeship period and had attained journeyman status, his seniority date should be made retroactive to the date he would have completed his apprenticeship but for his military service.

Thus, the basic issue here presented is the same as the issue we considered in *Tilton* v. *Missouri Pacific R.R.*, 8 Cir., . . . F.2d . . . (decided August 17, 1962), namely, whether in situations where an apprentice period is required for the development of proficiency and is required to be actually served, a claimant whose apprenticeship is interrupted by military service is entitled upon the completion of the service of his apprenticeship after his return from military service to have his seniority date as a journeyman accelerated to an earlier date.

Tilton sets out the pertinent provisions of the Act and analyzes the cases treating the problem here under consideration. No purpose would be served in attempting to retread the ground so well covered by Judge Blackmun [fol. 86] in that case. We adhere to the view of the law there stated. The apprentice carman involved in *Tilton* and the apprentice machinist here involved are covered by the same general contract between the same railroad and the same union. The apprentice rules relating to carmen and machinists differ in no material respect. The application of the law as stated in *Tilton* to the issues and facts here presented compel a reversal. In fairness to the able trial court, it should be observed that *Tilton* was decided subsequent to the trial court's decision in this case.

In *Tilton* we concluded that retroactive seniority could be granted only when the claimant would be promoted automatically or by reason of mere passage of time. We held "if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld."

In support of this principle, we relied upon and quoted from *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S.

265, and *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 259 F.2d 122, as well as other cited cases.

Full consideration was given to *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, and *Oakley* v. *Louisville & Nashville R.R.*, 338 U.S. 278, relied upon here by plaintiff. In *Tilton*, the reasons why advancement was not automatic are set forth in the opinion. Such reasoning is persuasive here.

The trial court in effect found that progression from apprentice to journeyman mechanic is not automatic, stating:

> "In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 [fol. 87] memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.
>
> "It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been 'highly probable' that the status in question would have been acquired at a time earlier than it was."

The trial court, upon the basis of substantial evidence that there was a shortage of journeymen mechanics at North Little Rock in 1955 and that apprentice mechanics upon completing their apprenticeship were generally immediately employed as journeymen, states:

> "While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic."

While we accept the trial court's finding as to the shortage of mechanics in North Little Rock in 1955, and the [fol. 88] resulting consequence that by reason thereof graduate apprentices were readily employed, we find no support in such finding for a conclusion that the apprentice's right to advancement is automatic. The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty. This is illustrated by the fact that there was a surplus of mechanics in November of 1955 at the Monroe shops. In our view, the fact that the railroad may have exercised its discretion liberally in instances where labor shortages existed does not foreclose its right to exercise its discretionary powers provided by the contract in the employment of journeymen.

Plaintiff in his brief correctly states, "an apprentice begins to earn seniority as a journeyman only after he completes his training and begins work as a journeyman." There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon the completion of his apprenticeship.

In *Tilton*, in answer to an argument similar to that here made, we stated:

> "Their argument, as already indicated, is that, despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work

period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act."

[fol. 89] Upon the basis of the standard set for determining the right to retroactive seniority in the *Tilton* and *McKinney* cases, we find no substantial evidence to support a finding that plaintiff's progression from apprentice machinist to machinist is automatic. Hence, the court erred in according plaintiff retroactive seniority as a journeyman machinist at its North Little Rock shops.

Defendant, relying upon *Horton* v. *United States Steel Corp.*, 5 Cir., 286 F.2d 710, as an additional basis for reversal, states that the automatic standard applies to transfers such as Brooks' transfer upon his request from the St. Louis shops to the North Little Rock shops. Since we have already determined that Brooks' right to promotion was not automatic, we deem it unnecessary to pass upon such contention.

The judgment appealed from is reversed and remanded with directions to dismiss the complaint.

* * * *

[fol. 90]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 17,019. September Term, 1962.

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT

vs.

ROBERT C. BROOKS

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

JUDGMENT—October 11, 1962

This cause came on to be heard on the record from the United States District Court for the Eastern District of Arkansas, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed.

And it is further Ordered by this Court that this cause be, and it is hereby, remanded to the said District Court with directions to dismiss the Complaint.

[fol. 91]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 92]

SUPREME COURT OF THE UNITED STATES

No. 732, October Term, 1962

ROBERT C. BROOKS, PETITIONER

vs.

MISSOURI PACIFIC RAILROAD COMPANY

ORDER ALLOWING CERTIORARI—February 18, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit is granted, and the case is placed on the summary calendar. The case is set for argument immediately following No. 664.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 O-680226 1012

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Universal Military Training and Service Act, 62 Stat. 604, 614, as amended, 50 U.S.C. App. 459:

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Robert C. Brooks,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case, entered on October 11, 1962.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Arkansas (App. B, *infra*, p. 26) is not reported. The opinion of the court of appeals (App. A, *infra*, p. 19) is reported at 308 F. 2d 531.

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[1] The government acts on behalf of the petitioner by virtue of Section 9(d) of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459(d).

JURISDICTION

The judgment of the court of appeals was entered on October 11, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into the service, they would be absolutely certain to achieve.[2]

STATUTE INVOLVED

The pertinent provisions of Section 9 of the Universal Military Training and Service Act (62 Stat. 614, as amended, 50 U.S.C. App. 459) are as follows:

> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position (other than a temporary position) in the employ of any employer and who (1) receives such certificate, and (2) makes application for reemployment within 90 days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than 1 year—
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> * * * * *

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[2] The question presented here is identical to the issue involved in *Donald I. Tilton, et al.* v. *Missouri Pacific Railroad Company*, 306 F. 2d 870 (C.A. 8), No. 664, petition for writ of certiorari filed by the Solicitor General, on behalf of the veterans, on December 14, 1962. Separate petitions are presented because of different factual patterns existing in each case.

(B) if such position was in the employ of a private employer, such person shall—

(i) if still qualified to perform the duties of such position, be restored by such employer or his successor in interest to such position or to a position of like seniority, status, and pay; or

(ii) if not qualified to perform the duties of such position by reason of disability sustained during such service but qualified to perform the duties of any other position in the employ of such employer or his successor in interest, be restored by such employer or his successor in interest to such other position the duties of which he is qualified to perform as will provide him like seniority, status, and pay, or the nearest approximation thereof consistent with the circumstances in his case.

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c)(1) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section shall be considered as having been on furlough or leave of absence during his period of training and service in the Armed Forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within 1 year after such restoration.

(2) It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) of this section should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment.

STATEMENT

Petitioner, Robert C. Brooks, was originally employed by respondent, The Missouri Pacific Railroad Company, as an apprentice machinist at the respondent's Monroe, Louisiana, shops on July 5, 1951. The apprenticeship program consisted of a period of 1,040 working days and the preparation of two written papers each month. The collective bargaining agreement provides that, if the apprentice is retained in the railroad's service upon completion of the apprenticeship, his seniority as a journeyman mechanic will date from the time of completion of the apprenticeship, but the evidence adduced at trial indicates that in practice seniority as a mechanic is dated from the date of first employment as a journeyman mechanic (R. 36–37).[1]

Petitioner entered the military service on February 1, 1952. It was stipulated between the parties that if petitioner had not entered the service, but had remained continuously in his civilian employment, he would have completed the apprenticeship period on November 3, 1955. Petitioner was honorably dis-

[1] "R." refers to the printed record in the court of appeals.

charged from the armed forces on November 7, 1953, and was reinstated as an apprentice at Monroe on November 23, 1953. However, the apprenticeship program at Monroe was terminated and petitioner was laid off on April 29, 1954 because of technological changes in the railroad industry.

In response to respondent's system call for apprentice machinists, petitioner transferred to respondent's St. Louis, Missouri, shops on July 6, 1954, where he continued the apprenticeship program. On July 25, 1955, petitioner requested and was granted a transfer to respondent's North Little Rock shops. He thereafter completed his apprenticeship on January 23, 1958, and was immediately employed there as a journeyman machinist. The Railroad, however, established petitioner's seniority as a journeyman at North Little Rock[4] as of the date he actually completed his apprenticeship and began work there as a journeyman. When petitioner protested and asserted that he was entitled to seniority from the date he would have completed his apprenticeship and begun work as a journeyman had he not entered the armed forces, respondent offered him seniority as of that date at its Monroe shops. Petitioner declined this "offer" because there was no work available at Monroe.[5]

[4] It should be noted that, generally, mechanics employed by respondent do not have system-wide seniority, but only have "point seniority," or seniority in the particular shop in which they are employed.

[5] Respondent's offer of retroactive seniority at Monroe was based upon an interpretation of a 1945 Memorandum of Understanding between the Railroad and petitioner's union. This agreement, reaffirmed in 1956, provides that in keeping with the requirements of federal law pertaining to veterans' re-employment rights, an apprentice who has entered military

On the theory that he was entitled under the Universal Military Training and Service Act to be treated as if he had continued in his employment during his military service, petitioner instituted this action in the district court. He sought to compel respondent to accord him seniority as a journeyman at North Little Rock from the date he would have completed the apprenticeship but for his induction into the military service. The district court held that petitioner was entitled to this retroactive seniority at North Little Rock because it found that, if petitioner had not entered the service, but continued his civilian employment and completed his apprenticeship on November 3, 1955, he would have been employed automatically as a journeyman at North Little Rock and would have earned seniority there from that date. This finding was based upon evidence establishing that (App. B, *infra*, p. 38):

> In 1955 there was a shortage of mechanics in the North Little Rock shops, apprentice mechanics were being temporarily upgraded to mechanics' status, and upon the completion of their training as mechanics, they were instantaneously employed as full fledged journeyman mechanics. While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employ-

service and who later is reinstated and completes his apprenticeship will "be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service." (R. 59.) The railroad and the union have interpreted this agreement as requiring only that the veteran be accorded "retroactive seniority" at the shop where he began his apprenticeship, and not where he completed it.

ment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic.

The court further held that petitioner's right to seniority at North Little Rock under the Act is not affected by the fact that he transferred from Monroe to St. Louis and then to North Little Rock, while he was an apprentice. The court found that petitioner would not in any event have completed his apprenticeship at Monroe because of the lack of work there, and that, prior to November 3, 1955 (the date petitioner would have completed his apprenticeship had he not entered the service), he had actually transferred to North Little Rock. Since petitioner actually was working at North Little Rock on the date that he would have completed his apprenticeship but for his military service, and since he would have been hired automatically as a journeyman at North Little Rock had he completed his apprenticeship on November 3, 1955, the court held that this was the location at which petitioner was entitled to retroactive seniority.[6]

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[6] The court stated (App. B, pp. 40–41):

Having determined that Monroe is not to be considered as plaintiff's retroactive seniority point, it seems clear that such point must be North Little Rock, as plantiff contends. In reaching this conclusion the Court does not speculate on whether had plaintiff not gone into military service he would have moved from Monroe to St. Louis and thence to North Little Rock, as in fact he did following his military service. In a case of this kind a veteran should not be required to prove, and indeed cannot prove, what course his life would have taken but for his military service.

The court of appeals reversed on the basis of its recent decision in *Tilton, et al.* v. *Missouri Pacific R.*, 306 F. 2d 870, petition for a writ of certiorari filed on December 14, 1962, No. 664. In *Tilton*, the Eighth Circuit had ruled that returning veterans are not entitled to the status they would have achieved but for their military service unless, at the time they were inducted, it was predictable with absolute certainty that they would have achieved such status as a matter of right. Applying that standard to the present case, the court below held that petitioner had no such absolute and automatic right to work as a journeyman.

REASONS FOR GRANTING THE WRIT

The ruling of the court below—that returning veterans are not entitled to the status they would have attained but for their military service unless it was predictable with absolute certainty when they left that they would have achieved such status—is in conflict with the basic purpose of the Act. It misapplies the standards enunciated in *McKinney* v. *Missouri-*

Had plantiff not been inducted, he might have tired of railroad work altogether, or he might have shifted to some other line, or applied for a transfer to some point other than North Little Rock.

But it is not speculative to say that in no event would plaintiff have completed his apprenticeship at Monroe, that he did complete it at North Little Rock in 1958, and would have completed it in 1955 but for his military service, and that as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics. * * *

Kansas-Texas R., 357 U.S. 265, and is inconsistent with other decisions of this Court and of other courts of appeals.[1] In view of these considerations and the obvious importance of this question in the administration of remedial veterans' legislation, the decision should be reviewed by this Court.

1. Section 9 of the Universal Military Training and Service Act, 62 Stat. 614, as amended, 50 U.S.C. App. 459, carries forward the reemployment provisions of earlier selective service acts which were enacted for the purpose of ensuring that a person inducted into the armed forces would not be penalized or disadvantaged, in the pursuit of his civilian career, as a result of his absence. See, *e.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284; *McKinney* v. *Missouri-Kansas-Texas R.*, *supra*, 357 U.S. at 270. In keeping with this purpose this Court has ruled repeatedly that, under the Act, the returning veteran is entitled to be restored to the position and status he would have attained as of right had he remained continuously in his civilian employment. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 284–285; *Oakley* v. *Louisville & N.R.*, 338 U.S. 278, 283. The Court has held, too, that the Act is to be liberally construed. *E.g.*, *Fishgold* v. *Sullivan Drydock & Repair Corp.*, *supra*, 328 U.S. at 285; *McKinney* v. *Missouri-Kansas-Texas R.*, *supra*, 357 U.S. at 270.

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[1] We here adopt by reference our analysis of the question presented and of the decisions of this Court and of other courts of appeals in the petition for certiorari filed in *Tilton, et al.* v. *Missouri Pacific R.*, No. 664.

It is incontestable that petitioner will suffer a severe disadvantage solely as a result of his military service if his seniority as a journeyman mechanic is computed from the date he actually completed the 1040-day apprenticeship period and began work as a journeyman. Because of petitioner's absence in the armed forces, individuals who began their apprenticeships after he did were able to begin work as journeymen sooner and thereby to jump ahead of petitioner in seniority. Through this advance in seniority, those individuals who remained on the job while petitioner was in the service have obtained decided advantages over petitioner, such as work preference and layoff and recall preference.

On the other hand, had petitioner not entered the service, he would have had a contractual right to complete the apprenticeship period prior to these other apprentices and, as the district court found, he in fact would have been employed automatically as a journeyman at North Little Rock when he did so, thus obtaining a November, 1955, starting date for his seniority as a journeyman machinist. The undisputed evidence showed that upon completion of his apprenticeship an employee becomes a qualified journeyman machinist who has a right to be afforded priority in doing a journeyman's work over any upgraded apprentice doing the same work (R. 35, 50–53). Since there was a shortage of journeyman machinists at North Little Rock during the period in which petitioner would have completed his apprenticeship had he not been serving his country (November 1955), petitioner

would have had a right to be employed immediately as a journeyman machinist unless his employer was willing to forego having the journeyman machinists' work done even by the upgraded apprentices who were then doing it (R. 50–53). On the basis of this evidence the district court found as a fact that it was the practice of the respondent in 1955 to exercise no discretion "in the employment of mechanics from the ranks of graduating apprentices" and that the "transition from the rank of apprentice to the rank of mechanic was automatic" (App. B., p. 38).

2. This Court's precedents establish that petitioner was entitled to retroactive seniority as a journeyman machinist on the basis of the district court's findings that under the contract and practices governing employment of machinists he would have obtained this status by beginning work as a journeyman machinist at North Little Rock on November 3, 1955. *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960. Indeed, the plain words of the statute direct that petitioner be accorded "such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." 50 U.S.C. App. 459(c)(2).

The court below, however, rejected the trial court's conclusion that the evidence of record established that petitioner had a right to a November, 1955, seniority date. Relying upon the extremely narrow construction of the statute it had recently adopted in *Tilton, et al.* v. *Missouri Pacific R., supra,* from which we have petitioned for certiorari, No. 664, this Term,

it held that a veteran is not entitled to an advancement in status unless "the promotion in question be automatic * * * as a matter of foresight" (306 F. 2d at 876)—*i.e.*, that it be predictable beyond peradventure at the time the veteran entered the service. Here, the court noted, it could not have been foreseen when petitioner entered the service that the respondent would need more journeyman machinists in November 1955 than it had journeyman applicants. If, contrary to fact, it had had more graduate-apprentice applicants than job openings in November 1955, the respondent could have exercised discretion in selecting journeyman machinists at that date; if, contrary to fact, it had had no job openings for machinists in November 1955, petitioner would not have been employed as a journeyman at that date. The Eighth Circuit held that a right to work as a journeyman machinist and thus obtain machinist seniority in November 1955 which was, as a matter of foresight, subject to such contingencies as these could not be made the basis for statutory seniority rights in light of its interpretation (in the *Tilton* case) of this Court's decision in *McKinney* v. *Missouri-Kansas-Texas R.*, 357 U.S. 265.

As we have shown in our petition for certiorari in *Tilton*, the Eighth Circuit's interpretation of the *McKinney* case is erroneous; indeed, it would largely read out of the statute the so-called "escalator" right (*Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284–285) that Congress intended to provide. The statute requires no predictably certain right to promotion at the time the employee enters the mili-

tary service. This Court has held a veteran entitled to retroactive seniority in a higher status where it was plainly not predictably certain, at the time of entering military service, that the veteran would have enjoyed the higher status had he remained in civilian life. In *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, the employee's right to a promotion depended upon a continued shortage of journeyman carmen during his training period—a contingency indistinguishable from that which the Eighth Circuit has held barred petitioner's statutory rights here—and this Court held the employee entitled to retroactive seniority in the higher position. Similarly, other courts of appeals have rejected the doctrine that a veteran's "escalator" rights to a higher status depend upon a promotion being absolutely predictable at the time of the employee's departure for the military service, although in these cases, too, the right to promotion was contingent upon employment conditions unforeseeable at the time of entering military service.[8]

It is, moreover, clear that this Court's *McKinney* decision did not impose a requirement that the veteran's right to a higher status as a result of continued employment be predictably certain at the time of his

[8] Thus, in *Morris* v. *Chesapeake & Ohio Ry. Co.*, 171 F. 2d 579 (C.A. 7), the court recited the fact that the promotion in question depended upon (1) the occurrence of a vacancy, and (2) the individual's making a bid for the vacancy (171 F. 2d at 579). In *Conner* v. *Pennsylvania R. Co.*, 177 F. 2d 854 (C.A. D.C.), the court noted that the transfer in question depended upon (1) a need for additional personnel in the higher position, (2) an "election" by the individual for the transfer, and (3) the individual's being "in good standing" in his lower position (177 F. 2d at 857).

departure for military service. In *McKinney*, unlike this case, there was no trial court finding that, at the time the employee would have become eligible for promotion, promotion was entirely automatic. To the contrary, McKinney was claiming the right to a promotion granted in his absence which, this Court stated, was "not dependent simply on seniority" but was "dependent on fitness and ability and the exercise of a discriminating managerial choice" (357 U.S. at 272). The Court went on to point out (*ibid.*):

> Petitioner was not entitled to a group 1 position simply because in his absence it had been bulletined, and if he had then been employed he might have applied for it, and respondent might have found that he possessed the requisite fitness and ability. The statute does not envisage overriding an employer's discretionary choice by any such mandatory promotion. * * *

The Court concluded that, where management had reserved the discretion to have promotions depend upon "fitness and ability," the employee could scarcely be considered as entitled to a promotion "as of right."

It is clear from a reading of the Court's opinion in the *McKinney* case that it ruled against the veteran solely because of the reservation of a meaningful managerial discretion in the promotion process. The Court was evidently influenced both by the practical difficulty of determining, even as a matter of hindsight, what the employer's choice among several eligible employees would have been and by the undesirability of interfering with an employer's retained

discretion in awarding higher positions. These considerations obviously have no application to a case such as this where the district court has found as a fact that, at the time petitioner would have become eligible for work as a journeyman mechanic, the respondent exercised no discretion in the employment of mechanics from the ranks of graduating apprentices and where the evidence indicates that at the relevant period petitioner would have had a right to employment as a journeyman prior to the rights of those apprentices then performing the work of machinists.

The inapplicability of *McKinney* to the facts of this case is, indeed, conclusively demonstrated by the fact that the Court remanded the *McKinney* case to give the veteran the opportunity to prove (as he had argued) that, notwithstanding his employer's apparent reservation of discretion, in fact by custom and practice he, as the senior union bidder for the higher position, would necessarily have obtained it. The same lack of original foreseeability as to the labor conditions that would develop while the veteran was in the service was present there as here. In *McKinney*, as here, it could not have been predicted with certainty when the employee entered the service that a higher position would become available and that he would be the senior man bidding for the position. If the Court had believed that such circumstances could affect the "automatic" character of a promotion, there would have been no point in its remanding the case to the trial court for evidence concerning custom and practice.

It is thus clear that, in requiring that the attainment of a genuinely automatic promotion be predictable with absolute certainty at the time the employee enters the military service, the court below seriously misread this Court's decision in *McKinney*. And its reading would, we submit, render the "escalator" rights bestowed on veterans by the Act largely meaningless. It is difficult to imagine a case where, at the time the veteran entered the service, it could be predicted with absolute certainty that all of the conditions necessary to his attaining a promotion would later occur. The variables cited by the Eighth Circuit in *Tilton* and the instant case will be present in most cases—the possibility, for example, that the veteran might have been laid off or fired before the promotion became available, or that he would not accept a promotion to which he was automatically entitled, or, as in the *Diehl* case, that a shortage of qualified journeymen would not continue. To these could be added any number of other "variables"—for example, that the higher position might never have become available or might have been eliminated by the employer's going out of business or merging with another company (cf. *Trailmobile Co.* v. *Whirls*, 331 U.S. 40). If the veteran's "escalator" right depends upon such wide-ranging speculation, it is an empty right indeed.*

* As the trial court held (App. B, pp. 39-41), the fact that petitioner transferred from Monroe to St. Louis, and then to

3. The decision below would adversely affect a very substantial number of veterans whom Congress intended to protect through the "escalator" reemployment rights guaranteed by the Act. The apprenticeship program of the respondent in this case is comparable to those in effect on many other railroads and in many other industries having hundreds of thousands of workers. With the continued draft of young men into the armed forces, the problems presented in this case will recur time and again. Moreover, the spread of automation magnifies the importance of

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North Little Rock, does not affect his right to retroactive seniority under the Act. First, it should be noted that, because of technological advances in the industry, petitioner would not have completed his apprenticeship at Monroe even if he had not entered the armed forces. Moreover, he actually transferred to North Little Rock, and was employed as an apprentice there, on the date that he would have completed his apprenticeship but for his military service. Second, the fact that petitioner transferred while he was an apprentice is not relevant to a determination of the seniority right which he claims. For, by the terms of the collective bargaining agreement, an employee begins to earn seniority as a journeyman only after he completes his apprenticeship. Finally, even had petitioner not transferred to North Little Rock but had completed his apprenticeship at some other point, he still would have had a right to be employed at North Little Rock on November 3, 1955. At that time, the Railroad had upgraded apprentices working as journeymen at Monroe, and the evidence indicates that an apprentice who graduated at any point had a right to "bump" an upgraded apprentice at any other point. See pages 30, 50, 52 of the Record in the court below.

seniority and gives the issue added importance for the future.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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JANUARY 1963.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,019

MISSOURI PACIFIC RAILROAD COMPANY, APPELLANT, *v.* ROBERT C. BROOKS, APPELLEE

[October 11, 1962]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

Before VOGEL and VAN OOSTERHOUT, Circuit Judges, and VAN PELT, District Judge.

VAN OOSTERHOUT, Circuit Judge.

Plaintiff Brooks, a veteran, brought this action under the Universal Military Training and Service Act of June 24, 1948, 50 U.S.C.A. § 459, to establish retroactive seniority rights as a machinist at defendant's North Little Rock shops. The trial court upheld plaintiff's contention and granted him retroactive seniority. This timely appeal by defendant followed.

Brooks entered into defendant's employment as an apprentice machinist at its Monroe, Louisiana, shops on July 5, 1951, continuing in such capacity until his induction into military service on January 24, 1952. He was honorably discharged on November 7, 1953, and upon his application he was restored to duty as an apprentice machinist at Monroe on November 23,

1953. On April 29, 1954, Brooks was laid off due to a reduction in work force. On July 6, 1954, he resumed his apprenticeship at defendant's shops at St. Louis, Missouri, where he remained until July 25, 1955, when upon his request he was granted a transfer to defendant's North Little Rock shops. Plaintiff completed the required 1040 days of apprenticeship at the North Little Rock shops on January 23, 1958, and was immediately thereafter employed as a journeyman machinist and was assigned his seniority as such at North Little Rock on January 23, 1958. Plaintiff was offered a retroactive seniority date of November 3, 1955, at Monroe upon the basis of defendant's interpretation of a 1945 memorandum of understanding between defendant and the union.[1]

Under the basic contract between the defendant and the union, an employee, subject to certain exceptions not here applicable, obtained seniority only at the point of his employment. Plaintiff rejected the offer of seniority at Monroe as there was no employment opportunity available there because of work changes brought about by the transition from steam to diesel locomotives.

The parties stipulated that *if* Brooks is entitled to retroactive seniority as a journeyman machinist at North Little Rock, the date would be November 3, 1955. Defendant made clear that the emphasis is on

[1] Plaintiff in his original complaint had asserted rights upon the basis of a 1945 memorandum of understanding between defendant and the union. After defendant had filed a motion to dismiss upon the ground that the court had no jurisdiction to grant relief beyond that founded upon the statute, Brooks, by amendment specifically stating his intention so to do, withdrew the assertion of his complaint based upon the 1945 memorandum. The trial court held such issue was withdrawn and plaintiff has taken no appeal from such holding, nor has he asserted error with respect thereto in his brief.

the word "*if*" and that it was denying Brooks had any right to retroactive seniority at North Little Rock. The applicable 1949 contract between the defendant and the union, of which plaintiff was a member, required an apprentice mechanic to serve in such capacity for 1040 days and in addition to satisfactorily complete a correspondence course furnished by the defendant. Such course consisted of two lessons per month. An examination was required as to each lesson. The passing grade was 75%.

Plaintiff concedes that actual service of 1040 days as an apprentice is a prerequisite to his attaining journeyman status. His contention is that since he actually served such apprenticeship period and had attained journeyman status, his seniority date should be made retroactive to the date he would have completed his apprenticeship but for his military service.

Thus, the basic issue here presented is the same as the issue we considered in *Tilton* v. *Missouri Pacific R.R.*, 8 Cir., — F. 2d — (decided August 17, 1962), namely, whether in situations where an apprentice period is required for the development of proficiency and is required to be actually served, a claimant whose apprenticeship is interrupted by military service is entitled upon the completion of the service of his apprenticeship after his return from military service to have his seniority date as a journeyman accelerated to an earlier date.

Tilton sets out the pertinent provisions of the Act and analyzes the cases treating the problem here under consideration. No purpose would be served in attempting to retread the ground so well covered by Judge Blackmun in that case. We adhere to the view of the law there stated. The apprentice carman involved in *Tilton* and the apprentice machinist here involved are covered by the same general contract be-

tween the same railroad and the same union. The apprentice rules relating to carmen and machinists differ in no material respect. The application of the law as stated in *Tilton* to the issues and facts here presented compel a reversal. In fairness to the able trial court, it should be observed that *Tilton* was decided subsequent to the trial court's decision in this case.

In *Tilton* we concluded that retroactive seniority could be granted only when the claimant would be promoted automatically or by reason of mere passage of time. We held "if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable—even highly probable—retroactive seniority is withheld."

In support of this principle, we relied upon and quoted from *McKinney* v. *Missouri-Kansas-Texas R.R.*, 357 U.S. 265, and *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R.R.*, 8 Cir., 259 F. 2d 122, as well as other cited cases.

Full consideration was given to *Diehl* v. *Lehigh Valley R.R.*, 348 U.S. 960, and *Oakley* v. *Louisville & Nashville R.R.*, 338 U.S. 278, relied upon here by plaintiff. In *Tilton*, the reasons why advancement was not automatic are set forth in the opinion. Such reasoning is persuasive here.

The trial court in effect found that progression from apprentice to journeyman mechanic is not automatic, stating:

> "In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority

> because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.
>
> "It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been 'highly probable' that the status in question would have been acquired at a time earlier than it was."

The trial court, upon the basis of substantial evidence that there was a shortage of journeymen mechanics at North Little Rock in 1955 and that apprentice mechanics upon completing their apprenticeship were generally immediately employed as journeymen, states:

> "While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic."

While we accept the trial court's findings as to the shortage of mechanics in North Little Rock in 1955, and the resulting consequence that by reason thereof graduate apprentices were readily employed, we find no support in such finding for a conclusion that the apprentice's right to advancement is automatic. The balance between supply and demand of a particular category of workmen at a designated point at a future date cannot be foreseen or predicted with any degree of certainty. This is illustrated by the fact that there was a surplus of mechanics in November of 1955 at the Monroe shops. In our view, the fact that the railroad may have exercised its discretion liberally in instances where labor shortages existed does not foreclose its right to exercise its discretionary powers provided by the contract in the employment of journeymen.

Plaintiff in his brief correctly states, "an apprentice begins to earn seniority as a journeyman only after he completes his training and begins work as a journeyman." There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon the completion of his apprenticeship.

In *Tilton*, in answer to an argument similar to that here made, we stated:

> "Their argument, as already indicated, is that, despite the uncertainties which concededly existed at the time of their entry into military service, their return to work and their completion of the work period dispelled those uncertainties and rendered them unfounded in fact. Therefore, it is said, since the work period has been completed and they have elected carman's seniority, it follows that, but for the military service, the plaintiffs would necessarily have achieved the higher status just ahead of their

next junior upgraded helpers. Unfortunately, from the plaintiffs' viewpoint, there appears to be little or no effective supporting authority among the numerous cases interpreting the Act."

Upon the basis of the standard set for determining the right to retroactive seniority in the *Tilton* and *McKinney* cases, we find no substantial evidence to support a finding that plaintiff's progression from apprentice machinist to machinist is automatic. Hence, the court erred in according plaintiff retroactive seniority as a journeyman machinist at its North Little Rock shops.

Defendant, relying upon *Horton* v. *United States Steel Corp.*, 5 Cir. 286 F. 2d 710, as an additional basis for reversal, states that the automatic standard applies to transfers such as Brooks' transfer upon his request from the St. Louis shops to the North Little Rock shops. Since we have already determined that Brooks' right to promotion was not automatic, we deem it unnecessary to pass upon such contention.

The judgment appealed from is reversed and remanded with directions to dismiss the complaint.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

Memorandum Opinion

(Filed in United States District Court December 18, 1961)

Plaintiff, Robert C. Brooks, has brought this action against the defendant, Missouri Pacific Railroad Company, to enforce certain claimed retroactive seniority rights as a machinist in the employ of defendant. Plaintiff's claim is based upon the re-employment provisions of the Universal Military Training & Service Act, 50 U.S.C.A., § 459, as amended,[1] and upon the collective bargaining agreement in force at all pertinent times between the railroad and System Federation No. 2, Railway Employees' Department, A.F. of

[1] Insofar as here pertinent section 459(a) and 459(b)(B)(i) provide in substance that where an employee of a private employer is inducted into the armed services and satisfactorily completes his period of training and service, and receives a certificate to that effect, such employee is entitled to re-employment, provided that he is still qualified to perform the duties of his employment and makes timely application for such re-employment. The re-instatement of such employee shall be to the same position held by him formerly or to some other position with "like seniority, status and pay." Further, any person who is so restored to his former position shall be deemed to have been on furlough or leave of absence during the period of his military training and service, and his restoration shall be without loss of seniority. 50 U.S.C.A. App. §459(c)(1). Section 459(d) vests jurisdiction in the district courts of the United States to entertain suits brought to enforce re-employment rights of returned service men, and provides that the United States Attorneys may represent them in such suits. Plaintiff has such representation in this case.

L. The cause has been tried to the Court and submitted on written briefs. This memorandum incorporates the Court's findings of fact and conclusions of law.

On July 5, 1951, plaintiff was employed by defendant as an apprentice machinist at its Monroe, Louisiana, shops. The apprentice working course is normally completed in 1040 working days, and in addition an apprentice is required to complete satisfactorily a correspondence course furnished by defendant.

At the time of plaintiff's employment there was in effect between the railroad and the Union a collective bargaining agreement which had become effective on September 1, 1949, and which apparently superseded an earlier agreement. Rule 37 of the agreement in force at the time plaintiff was hired provided that the ratio of apprentices in their respective crafts should not be more than one apprentice to every five machinists; and that if within the "first period of training" [2] an apprentice showed no aptitude for the trade, he would not be retained in employment, but that an apprentice should not be dismissed from service during his apprenticeship without just cause. Rule 37(e) provided specifically that if an employee was retained in service after completing his apprenticeship, his seniority rights as a mechanic would date from the time of the completion of the apprenticeship.

Prior to plaintiff's employment and in December, 1945, when the problem of veteran's re-employment rights had become urgent, the railroad and the Union had entered into a "Memorandum of Understanding" which recognized that under the law an employee returning from military service would be entitled to be restored to the position to which his accumulated se-

[2] The materials before the Court indicate that the 1040 days of apprenticeship were divided into eight training periods of 130 days each.

niority, including time spent in military service, would have entitled him and which he would have occupied had he not gone into service. With specific reference to apprentices, this memorandum provided that one who entered the military service and resumed his apprenticeship upon completion of that service would be accorded seniority as of the date upon which the apprenticeship would have been completed had the apprentice remained continuously in the railroad's service.

Before completing his apprenticeship plaintiff was inducted into the military service on January 24, 1942. He was honorably discharged on November 11, 1953, thereafter applied for re-instatement as an apprentice, and was restored to duty at Monroe on November 23, 1953.

On April 29, 1954, plaintiff was laid off due to a reduction in force at Monroe. On July 6, 1954, plaintiff was called by defendant to work as an apprentice[3] in its St. Louis shops, where he continued his training until July, 1955, when he was transferred, at his own request, to defendant's North Little Rock shops. Plaintiff completed his training as an apprentice on January 23, 1958, and he was immediately hired as a journeyman mechanic or machinist at North Little Rock.

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[3] Rule 21(e) of the collective bargaining agreement provided that in connection with reductions in force the ratio of apprentices would be maintained. Rule 23 provided that men laid off by reason of reduction in force should be given preference for work available in other shops, and the right to transfer to such shops with the privilege of returning to their home stations when forces at such stations should be increased. It was further provided that upon such a transfer the employee involved would establish seniority at the transfer point, but that such seniority at that point would end when the employee was released from employment at the transfer point.

The record discloses that mechanics in the employ of the defendant do not have system-wide seniority. Rather, such an employee has seniority in one particular shop, a system that is called "point seniority."[4] Due to the shift by the railroads in recent years from steam to diesel powered locomotives, which latter type locomotives require less maintenance and service than the former, defendant's need for mechanics has been reduced very drastically and more so in some shops than in others. Hence, a mechanic's point of seniority can be as important as his seniority date or even more so. It is the importance of the point of seniority to a mechanic which has given rise to the instant controversy.

It will have been observed that while Rule 37(e), as it appeared in the 1949 agreement, provided that a mechanic's seniority as such should begin upon the completion of his apprenticeship, said rule had nothing to say about the mechanic's point of seniority. Probably in 1949, and indeed for some years thereafter, there was no real need for the contract to deal specifically with points of seniority because normally an apprentice would complete his training in the same shop in which he began it and would be employed in that shop; thus fixing his initial seniority point. Therefore, it can be said that from a practical standpoint a machinist's initial point of seniority was the shop in which he completed his training. In 1956, while plaintiff was employed at North Little Rock, the text of Rule 37(e) was amended so as to provide

[4] In this opinion the Court will have occasion to use the phrases "seniority point" or "point of seniority." Those phrases refer to the particular shop in which a given employee has seniority at a given time. Ordinarily, and subject to certain qualifications not here material, an employee who transfers from one shop to another loses seniority in the shop from which he transfers.

that an apprentice's seniority as a machinist would be as of the date of the completion of his training and in the shop in which he was employed when his training was completed. In connection with the 1956 amendment to Rule 37(e) it was specifically recognized that the 1945 memorandum of understanding, which has been mentioned, was to remain in full force and effect and was not modified by the amendment.

Although the amendment to Rule 37(e) spelled out a mechanic's initial point of seniority, and although that amendment referred to the 1945 memorandum which accorded retroactive seniority to apprentices returning from military service, the amendment for some reason was silent as to whether such an apprentice's seniority in the shop where he completed his training would be retroactive in that shop. The failure of the railroad and the Union to deal specifically with the problem of the seniority point of apprentices who have completed their training after a period of military service and who are entitled to retroaction seniority under the 1945 understanding has in instances created problems with which the railroad and Union have undertaken to deal by construing the collective bargaining agreement, including the 1945 understanding and the 1956 amendment to Rule 37(e), to mean that an apprentice so situated is to be given either retroactive seniority in the shop where he commenced his training, regardless of where he completed it, or non-retroactive seniority in the shop where he completed his training, regardless of where he commenced it. This construction causes no difficulty where the apprentice in question upon his return from service completes his training in the same shop in which he was first employed, but it can cause difficulty where the apprentice starts his training in one shop and completes it in another, and where the sec-

ond shop is a more advantageous seniority point than the first.

When plaintiff completed his apprenticeship and was hired as a mechanic in 1958, the railroad accorded him seniority as of that date in the North Little Rock shops. This was in accord with Rule 37(e) as amended, but without regard to any retroactive seniority. While plaintiff accepted the employment at North Little Rock and has worked in the shop there since that time, he protested the fact that he had not been allowed retroaction seniority. The railroad thereupon indicated a willingness to allow him such seniority but with Monroe as his seniority point. Plaintiff refused to accept that proposition since even with retroactive seniority he would not be able to work in the Monroe shop at this time and perhaps not for a number of years. The railroad's willingness to grant plaintiff retroactive seniority at Monroe appears to have been in accord with the construction which the railroad and the Union have placed upon the overall collective bargaining agreement.

Affairs having come to this state, the plaintiff commenced this action. It is the theory of plaintiff that he is entitled to retroactive seniority at North Little Rock, whereas defendant takes the position that if plaintiff is to have any retroactive seniority it must be at Monroe. It has been conceded that whether plaintiff's retroactive seniority point be North Little Rock or whether it be Monroe, his retroactive seniority date is November 3, 1955, which is the date upon which he would have completed his apprenticeship had he not been called into military service.

In resisting the claim of plaintiff, defendant attacks both the jurisdiction of the Court and the merits of the claim. It is asserted by the railroad that as far as the Act is concerned the only right that plaintiff

had upon his return to civilian life was to be restored to his position as an apprentice and given an opportunity to complete his training, whereupon, if he should be employed by defendant as a mechanic, he would get seniority as such in the shop where the training was completed and as of the date of the completion. And the defendant argues that when plaintiff was put back to work as an apprentice and when he actually completed his course of training in 1958 and was hired in the North Little Rock shop and was given seniority as of the date of the completion of his training, plaintiff received everything that the Act required.'

While defendant recognizes that plaintiff was entitled to retroactive seniority under the 1945 memorandum of understanding, it contends that the provision of that memorandum which gave returning apprentices retroactive seniority went further than was required by the statute, and that when plaintiff seeks to enforce those rights he is not suing under the statute but on a contract which gives him rights greater than those which the Act accords. From this premise defendant argues that since to grant plaintiff relief would require the Court to construe and apply a railroad collective bargaining agreement, the controversy is within the exclusive jurisdiction of the National Railway Adjustment Board created by section 3 of the Railway Labor Act, 45 U.S.C.A., § 153, and is beyond the jurisdiction of the Court.[8] See *Slocum* v. *Delaware L. & W.R. Co.*, 339 U.S. 239.

On the merits, defendant repeats its contentions that under the Act plaintiff is not entitled to retro-

[8] This jurisdictional contention and the further contention that the complaint fails to state a claim upon which relief can be granted were first raised by motion to dismiss, on which motion the Court reserved its ruling.

active seniority at North Little Rock or at any other place, and that as far as the 1945 agreement is concerned, plaintiff is bound by the construction adopted by the railroad and the Union with respect to the overall collective bargaining agreement, including the 1945 memorandum, the 1949 printed contract, and the 1956 amendment to Rule 37(e) of the 1949 agreement, under which construction plaintiff has a choice of having North Little Rock as a seniority point with a non-retroactive seniority date of November 23, 1958, or having Monroe as a seniority point with seniority retroactive to November 3, 1955.

Before discussing further the contentions of the parties it is well to point out what the reemployment provisions of the Act do and what they do not do. The purpose of section 459 is succinctly stated in subsection (c)(2) thereof:

> "It is declared to be the sense of the Congress that any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) (of this section) should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment."

Subsection (c)(2) has been construed frequently by the Courts. As so construed, it means that the returning veteran upon restoration to his job is to enjoy such status, pay, seniority, and promotions as would have accrued to him automatically had his employment not been interrupted by military service. No agreement between any employer and any collective bargaining agent nor any interpretation or application of an existing collective bargaining agreement

which infringes upon the reemployment rights granted by the statute, or which discriminates against returning veterans, can be permitted to stand. On the other hand, the statute, while to be construed liberally, does not entitle a returning veteran to benefits or to status which he would not have enjoyed or received automatically had he remained constantly on the job. The veteran is not entitled to a windfall because he is a veteran, or to better treatment or more benefits than he would have received had he not gone into the service. And, as indicated, the veteran must show that the status or seniority which he seeks under the Act would have accrued to him automatically had he remained in private employment. It is not sufficient for him to show merely that there was "high probability" that he would have obtained the status or seniority sought had it not been for his military service. *McKinney* v. *Missouri, K. & T. R. Co.*, 357 U.S. 265; *Diehl* v. *Lehigh Valley R. Co.*, 348 U.S. 960; *Oakley* v. *Louisville & Nashville R. Co.*, 338 U.S. 278; *Fishgold* v. *Sullivan Drydock & Repair Corporation*, 328 U.S. 275; *O'Hare* v. *United States*, Ct. Cl., 288 F. 2d 705; *Horton* v. *United States Steel Corporation*, 5 Cir., 286 F. 2d 710; *Rix* v. *Turnbull-Novak, Inc.*, 8 Cir., 160 F. 2d 785; *Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 8 Cir. 259 F. 2d 122; *Bassett* v. *Texas & Pacific R. Co.*, 5 Cir., 258 F. 2d 819.

I

Concerning the challenge to the Court's jurisdiction, it is clear that to the extent that a railroad employee seeks to enforce rights guaranteed to him under the Act the federal courts have jurisdiction, notwithstanding the fact that to afford relief may require such courts to construe and apply a railroad collective bargaining agreement. In such a case there

is no need for the employee to exhaust possible remedies available to him under the Railway Labor Act. *McKinney* v. *Missouri, Kansas & Texas R. Co., supra.*

On the other hand, the Court is willing to assume, for present purposes at least, that where the collective bargaining agreement grants to a returning veteran more rights than the Act itself accords him, an action brought by the veteran to enforce such additional rights may be considered as not "founded upon the statute", but to be: "based upon the contract," and thus perhaps beyond the jurisdiction of the Court.[6]

If, as defendant contends, the 1945 memorandum of understanding confers upon returning apprentices contractual rights over and above those granted by the underlying collective bargaining agreements, which rights the statute authorizes the federal courts to enforce, and over above those which the statute

---

[6] Making jurisdiction depend upon the characterization of an action like this as "founded on the statute" on the one hand or "based upon the contract," on the other hand, creates some difficulty which is at least in part semantic. The difficulty arises from the fact that seniority, whether in the railroad industry or in some other industry, is essentially contractual, and the rights asserted under the Act must have their origin in a collective bargaining agreement. Hence, any suit to establish seniority rights is, in a sense, "based on" the underlying contract because in the absence of such a contract no such rights exist. In this connection it was pointed out in *McKinney* that the Act itself creates no rights of seniority and no seniority system. It simply recognizes such rights and systems as may exist by virtue of prior agreements, and requires an employer to restore a returned veteran to his employment and to grant such seniority under the agreement as he would have had but for his military service. But, *McKinney* holds that a veteran suing to enforce his reemployment rights, including seniority, is doing more than merely suing on the contract. When he brings his action he asserts "special rights bestowed upon him in furtherance of a federal policy to protect those who have served in the armed forces." (357 U.S. at p. 269).

confers, and if plaintiff is basing his claim on the 1945 memorandum, then defendant's jurisdictional plea might well be meritorious. Cf. *Delman* v. *Federal Products Corporation,* 1 Cir., 251 F. 2d 123. However, it does not appear that plaintiff now relies on the 1945 memorandum as giving him some special rights which he would not have had in the absence of such memorandum. In fact, when plaintiff amended his complaint, he deleted all reference to said memorandum and stated that one of the purposes of the amendment was to make such deletion. Hence, while plaintiff claims that he is entitled to what the 1945 memorandum says he is entitled to have, it now appears that he bases that claim on the statute, as applied to the basic collective bargaining agreement establishing a seniority system and seniority rights, and contends that under the Act defendant is required to give him retroactive seniority at North Little Rock.

With the case in this posture, the Court holds that it has jurisdiction of the cause, and defendant's plea to the contrary will be rejected.

With the jurisdictional question thus disposed of, the case, on the merits, presents two questions: (1) whether under the Act plaintiff is entitled to retroactive seniority to be measured in point of time from the date he would have completed his apprenticeship but for his military service; (2) If so, then is plaintiff entitled to retroactive seniority at North Little Rock? Putting the second question in slightly different language, does the construction which has been adopted by the railroad and the Union which would deny plaintiff retroactive seniority at North Little Rock, while offering it to him at Monroe, violate plaintiff's rights under the Act?

II

In contending that plaintiff had no retroactive seniority rights under the Act and apart from the 1945 memorandum, the railroad's contention is simply that apprentices in the railroad industry are not entitled to such seniority because they have no automatic right to be employed as journeyman mechanics upon the completion of their training, and that the selection of particular journeymen out of a group of graduate apprentices involves the exercise of managerial judgment and discretion and may also involve additional factors other than the fact that given apprentices may have completed apprentice training.

It may be conceded that in many instances the transition of an apprentice from his apprenticeship to employment as a journeyman craftsman depends on more than lapse of time and the completion of a course of instruction so that it cannot be said that had the apprentice in question not been called into military service he would automatically have acquired journeyman status at a time earlier than that at which he actually completed his training and was in fact employed as a journeyman. And it is clear that in such cases the Act does not require the employer to accord retroactive seniority, even though it may have been "highly probable" that the status in question would have been acquired at a time earlier than it was. *McKinney* v. *Missouri, Kansas & Texas R. Co., supra; Sularz* v. *Minneapolis, St. Paul & Sault Ste. Marie R. Co., supra; Bassett* v. *Texas & Pacific R. Co., supra; Addison* v. *Tennessee Coal, Iron & Railroad Co.*, 5 Cir., 204 F. 2d 340. See also the unreported opinions of the United States District Court for the Eastern Division of the Eastern District of

Missouri in the cases of *Cross* v. *Thompson, Trustee*, Docket No. 8083(3), decided in 1954, and *Tilton et al.* v. *Missouri Pacific R. Co.*, Docket Nos. 59C 301(2), 59C 302(2), and 59C 303(2), decided in 1959.

Although defendant earnestly contends that the authorities just cited govern and establish that plaintiff is not entitled to retroactive seniority under the Act, the record here discloses that plaintiff had a contractual right under the basic agreement to complete his apprenticeship, that he would have completed the same in 1955 had he not been called into military service, and that had he completed it at that time he would, in point of practice, have been hired automatically as a journeyman machinist with seniority as of the date of completion of his apprenticeship. In 1955 there was a shortage of mechanics in the North Little Rock shops, apprentice mechanics were being temporarily upgraded to mechanics' status, and upon the completion of their training as mechanics, they were instantaneously employed as full fledged journeyman mechanics. While it is true that Rule 51 of the 1949 agreement appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, the evidence shows that in practice such discretion had no play, and that transition from the rank of apprentice to the rank of mechanic was automatic.

In the Court's view the factual elements present in the instant case serve to distinguish it from the cases relied upon by the defendant, and the Court holds that in the circumstances defendant was required to grant retroactive seniority to plaintiff when he completed his training and was employed as a mechanic. Cf. *McNichols* v. *Southern Railway Co.*, E.D. Ky., 194 F. Supp. 148.

III

There remains for consideration the question of whether plaintiff is entitled to retroactive seniority at North Little Rock. In arguing that he is not so entitled the railroad contends that the collective bargaining agreement is ambiguous as to retroactive seniority points, and that the construction placed upon the agreement by the railroad and the Union is permissible and binding upon plaintiff. It is further argued that it has not been established with the requisite certainty that plaintiff would have completed his apprenticeship in North Little Rock had he not been required to enter the armed forces.

The construction of the agreement invoked by the railroad gives the Court no problem as it applies to cases in which the apprentices in question would have completed their training in the same shops where such training was begun, which is the normal course of events. In such a case the returned service man gets exactly the same seniority date and exactly the same seniority point as he would have obtained had he remained constantly on the job throughout his apprenticeship. The Act does not entitle an apprentice to a more advantageous point of seniority than he would have had had he never entered the military service, or because he completed his training in a busier shop than the one in which he was employed prior to his service and in which he would ordinarily have completed his training had he been left undisturbed.

However, this is not such a case. In no event would plaintiff have completed his training at Monroe. The parties have agreed that plaintiff's retroactive seniority date is November 3, 1955, and long before that time plaintiff had been cut off at Monroe and would

have been cut off there even if he had not gone into service. He would have been required to complete his training in some other shop, and on November 3, 1955, when training would have been completed plaintiff actually was employed at North Little Rock.

In such circumstances the attempt of the defendant and the Union to fix plaintiff's retroactive seniority at Monroe clearly violates the Act since it does not restore plaintiff to the same status in point of seniority he would have occupied but for his military service. Indeed, seniority at Monroe would be entirely unrealistic, and in fact meaningless, since there has been no work for plaintiff at Monroe at any time subsequent to his lay-off there in 1954.

Having determined that Monroe is not to be considered as plaintiff's retroactive seniority point, it seems clear that such point must be North Little Rock, as plaintiff contends. In reaching this conclusion the Court does not speculate on whether had plaintiff not gone into military service he would have moved from Monroe to St. Louis and thence to North Little Rock, as in fact he did following his military service. In a case of this kind a veteran should not be required to prove, and indeed cannot prove, what course his life would have taken but for his military service. Had plaintiff not been inducted, he might have tired of railroad work altogether, or he might have shifted to some other line, or applied for a transfer to some point other than North Little Rock.

But it is not speculative to say that in no event would plaintiff have completed his apprenticeship at Monroe, that he did complete it at North Little Rock in 1958, and would have completed it in 1955 but for his military service, and that as of that time he was employed in the North Little Rock shops and would have been hired there automatically as a journeyman

mechanic. Had he been so employed at that time, his seniority point would have been fixed at North Little Rock under the actual practice of the railroad and the Union in connection with the initial employment of mechanics. Since the Court has concluded that under the Act plaintiff is entitled to retroactive seniority, it follows in the circumstances that his retroactive seniority point should be at North Little Rock. See *McNichols* v. *Southern Railway Co.*, E.D. Ky., *supra*. In so holding the Court believes it is awarding plaintiff nothing to which he is not entitled under the Act. To hold otherwise would be to give him substantially less than the Act requires and would be, in fact, to give him nothing.

Judgment will be entered directing the defendant to accord plaintiff a retroactive seniority date of November 3, 1955, and fix his retroactive seniority point at North Little Rock. Counsel for plaintiff may submit a precedent for judgment after first obtaining opposing counsel's approval as to form and verbiage.

Dated this 18 day of December, 1961.

/s/ J. SMITH HENLEY,
United States District Judge.

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In the Supreme Court of the United States

October Term, 1962

No. 732

ROBERT C. BROOKS ..... PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY ..... RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

QUESTION PRESENTED

Petitioner sets out the Question Presented as follows (Pet. 2):

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into the service, they would be absolutely certain to achieve.

The Record, and the decision of the Court of Appeals, do not support the presentation of the question so stated. The question of law decided by the Court of Appeals that was dispositive of the appeal was this:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored not only to that status and seniority that they would have automatically achieved as of right, but for the military interruption of the employment, but also are entitled to such status and seniority as appears in retrospect that there is a high probability they would have achieved?

STATEMENT

The petitioner's employment by respondent, interrupted by military service, was an apprenticeship the successful completion of which required actual on-the-job training for 1040 working days. Also required was satisfactory performance in a correspondence course consisting of two written lessons a month and the demonstration of the proper aptitude in the work (R. 23-25). After his return from military service, he actually completed the apprenticeship on January 23, 1958. He was immediately thereafter employed as a journeyman machinist and assigned a seniority date as such coinciding with the date of completing his apprenticeship. In this suit he seeks a retroactive seniority date of November 3, 1955, which was stipulated to be the correct date *if* he was entitled to retroactive seniority (R. 18-20).

Had petitioner completed his apprenticeship on November 3, 1955, there was no obligation on the part of respondent under the collective bargaining agreements then in effect between it and the labor organization of which petitioner was a member to employ him as a journeyman (R. 47-48). Under Rule 37 (e) as it read at that time, a former apprentice established seniority as a mechanic only if retained in service upon completing the apprenticeship (R. 36-37, 62). The trial court found that the collective bargaining agreement "* * * appears to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, * * *" (R. 38). The Court of Appeals found on examination of the entire written collective bargaining agreement that "There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon completion of his apprenticeship." (Pet. 24) The Court of Appeals was furnished, by agreement of counsel and at the Court's request in the course

of oral argument, complete copies of the applicable collective bargaining agreements. The District Court had the complete copies before it, but only parts were designated for formal inclusion in the Record (R. 37-38).

However, the District Court held that petitioner was entitled to the retroactive seniority date, resting its decision on the evidence that there were some apprentice machinists working in an upgraded position as machinists at the North Little Rock shops in November and December, 1955, (R. 21-22), and testimony that the Railroad Company has recognized that its right to upgrade an apprentice depended on the unavailability of qualified journeymen (R. 49-50). The obligation thus recognized was described as an election between hiring the available journeyman who had just finished his apprenticeship, or loss of the right to retain upgraded apprentices of that craft at that point (R. 52).

The District Court considered these facts to constitute a showing that petitioner would have been employed as a machinist at North Little Rock if he had finished his apprenticeship there on November 3, 1955, as a matter of right, and as an advancement in status that would necessarily have occurred simply by virtue of continued employment, as those concepts are enunciated in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U. S. 265. However, while accepting the trial court's findings as to the shortage of machinists at North Little Rock in 1955 and that graduate apprentices were therefore readily employed, the Court of Appeals held that these findings did not support the conclusion that the apprentice's right to advancement was automatic so as to meet the test of *McKinney* (Pet. 24).

ARGUMENT AGAINST GRANTING THE WRIT

The Court of Appeals did not hold, as suggested in the Petition, that the Act required that returning veterans be "* * * restored only to that status or seniority which, it could be foreseen at the time they went into service, they would be absolutely certain to achieve." (Pet. 2). The holding was simply that completion of the apprenticeship and employment as a journeyman would not have occurred by way of automatic progression as a matter of right if petitioner had remained continuously in his civilian employment. His claim did not meet the *McKinney* standard. These advancements would not neggssarily have occured to petitioner simply by virtue of continued employment. The employer's discretion preserved in the collective bargaining agreement to select journeymen from among graduate apprentices, although liberally exercised in time of shortage, is nonetheless the final test that petitioner and others similarly situated must meet before there is any right to employment as a journeyman or seniority in that capacity. It may be highly probable that claimant would have made the advancement to journeyman had he remained in the civilian employment, but *McKinney* made it clear that the test was one of automatic progression.

The Court of Appeals merely applied the clear language of *McKinney* to the facts of this case, and no reasonable interpretation of its decision would support the contention that it adopted a standard of "absolute certainty." The Record and the decision simply do not support or present the Question Presented as stated by petitioner (Pet. 2).

What petitioner really seeks here is a re-examination of the very principles that have been universally considered to be settled since the publication of *McKinney*. When *McKinney* was decided this Court had already devoted considerable

time to defining the limits within which the Act permits the veteran to reproduce what might have been but for his military service. See *Diehl v. Lehigh Valley*, 348 U. S. 960, *Ford Motor Co. v. Huffman*, 345 U. S. 330, *Oakley v. Louisville & Nashville*, 338 U. S. 278, *Aeronautical Indust. Dist. Lodge v. Campbell*, 337 U. S. 521, *Trailmobile Co. v. Whirls*, 331 U. S. 40, and *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U. S. 275. *McKinney* was the considered culmination of repeated review by this Court of the scope of the benefits conferred by the Act. There was nothing precipitate about that decision, nor is there any reason to suspect that it is not a correct pronouncement of the intent of Congress.

The lower federal courts have applied the rule of *McKinney* without difficulty, and there is no disagreement among the courts of appeals as to its meaning. See *Bassett v. Texas & Pacific Railroad Co.*, 258 F. 2d 819 (5 Cir., 1958), *Horton v. United States Steel Corp.*, 286 F. 2d 710 (5 Cir., 1961), *Jefferson v. Atlantic Coast Line Railroad Co.*, 303 F. 2d 522 (5 Cir., 1962), *Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 259 F. 2d 122 (8 Cir., 1958) and *Tilton v. Missouri Pacific Railroad Co.*, 308 F. 2d 531 (8 Cir., 1962).

Petitioner states that the decision of the Court of Appeals is inconsistent with the decisions of other courts of appeals, and adopts by reference its citation to those decisions contained in the petition for certiorari filed *Tilton*, No. 664, October Term, 1962 (Pet. 9). However, the cases therein cited were decided before *McKinney* and are hardly relevant on the question of whether the courts of appeals are in conflict on the meaning or application of that decision.

The real question presented on this Petition is whether this Court, on a Question Presented (Pet. 2) that is unsupported by either the Record or the decisions of the courts below,

should now review the correctness of *McKinney*. None of the considerations appearing in Rule 19 that prompt this Court to grant certiorari are shown here, nor is any argument advanced by petitioner directed toward demonstrating that *McKinney* was erroneously decided.

CONCLUSION

The decision of the Court of Appeals is correct; it is in accord with the applicable decisions of this Court; the question decided by the Court of Appeals was settled by this Court in *McKinney;* and there is no conflict between the courts of appeals as to the meaning or application of the *McKinney* decision. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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January, 1963.

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No. 53

In the Supreme Court of the United States

October Term, 1963

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

October Term, 1963

No. 53

ROBERT C. BROOKS ..... PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY ..... RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

In its Petition for a Writ of Certiorari, petitioner stated the Question Presented as follows:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored only to that status or seniority which, it could be foreseen at the time they went into service, they would be absolutely certain to achieve. (Pet. 2).

Pointing out that the Record and the decision of the court of appeals did not support presentation of the question so stated, respondent suggested that the question of law decided

by the court of appeals that was dispositive of the appeal was this:

> Whether, under Section 9(c) of the Universal Military Training and Service Act, returning veterans re-employed by their former employers are entitled to be restored not only to that status and seniority that they would have automatically achieved as of right, but for the military interruption of the employment, but also are entitled to such status and seniority as appears in retrospect that there is a high probability they would have achieved? (Brief in Opposition, p. 1).

Petitioner now states the Question Presented in this language:

> Whether, upon completion of training periods of fixed duration, veterans are entitled, under the Universal Military Training and Service Act, to be assigned seniority dates as journeymen based upon the date when they would have completed their training periods and obtained journeyman seniority had they remained continuously in their railroad employment during the duration of their military service. (Petitioner's Brief, p. 4).

Respondent suggests that, as changed, the question is still carefully worded to avoid or ignore the clear standards fixed in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265, where seniority rights preserved by the Act were held limited to those which would have come automatically as a matter of right simply by virtue of the passage of time.

STATEMENT

It is stated at page 13 of petitioner's Brief, that the parties stipulated that "had Brooks remained in the Railroad's employ and not entered military service, he would have completed the apprenticeship period on November 3, 1955, and achieved seniority accordingly (B. R. 19)." It is important that the limited scope of this stipulation be made clear. It was not the intent of this stipulation that it should remove all the uncertainties incident to Brooks' completion of the apprenticeship and therefore amount to an agreement that his progression through the apprenticeship was automatic as that standard was used in *McKinney*. Neither the stipulation as made, nor the facts established by the proof, support such a conclusion.

Respondent conceded prior to the commencement of this suit that Brooks was entitled to a retroactive seniority date on the roster at Monroe, Louisiana. Brooks' Complaint so reflects (R. 3). Respondent's position throughout has been that his right to such retroactive seniority arises out of the applicable collective bargaining agreement which is the Memorandum of Understanding of December 4, 1945 (R. 59). As indicated in footnote 9, page 12, of petitioner's Brief, this agreement assigns such retroactive seniority at Monroe only.

The Memorandum of Understanding provides that the returning veteran who completes his interrupted apprenticeship "* * * * be given a seniority date as of the date he would have completed his apprenticeship had he remained in the railroad service." (R. 59). Therefore, in order to assign the rights to which various individuals were entitled under this agreement, it was necessary to adopt a method of computation of the date a given veteran "would have completed his apprenticeship" as that concept is employed *in the agreement*. This

computation necessarily ignores the uncertainties as to when and whether the apprenticeship, in fact, would have been completed. It is these uncertainties that are relevant in testing whether the progression would have been automatic as that concept is defined in *McKinney* for the purpose of determining whether the Universal Military Training and Service Act requires the granting of retroactive seniority. The act requires retroactive seniority only when there is, in fact, an automatic progression. The agreement ignores the automatic progression concept in defining the rights it confers. Petitioner does not now seek any right under the agreement, but abandoned such claims when he filed his Amended Complaint specifically eliminating reference to the Memorandum of Understanding of 1945 (R. 7).

It was with the matter in this posture that counsel undertook to enter into the stipulation previously mentioned relating to the computation of a retroactive seniority date in *accordance with the terms of the Memorandum of Understanding*, and not by virtue of any right to retroactive seniority that might be conferred by the Act. This is the colloquy which petitioner's Brief refers to as a stipulation that Brooks would have completed the apprenticeship on November 3, 1955 but for the military interruption (R. 16):

> "The Court: All right; now, Mr. Light, what is the nature of your testimony?
>
> Mr. Light: Your Honor, the principal issue, I think we all agree, is whether or not the retroactive seniority feature is to be applied at North Little Rock. Now, to reach that it is quite possible, it is essential, I believe, that we find out or that the Court determine what the correct retroactive seniority date will be, if there is to be one. Now, the Railroad Company, *acting pursuant to the collective*

bargaining agreement, has computed what the seniority date would be if he is entitled to a retroactive seniority date, and that date as we compute is November 3, 1955, several months earlier than the one computed by the Government, and a couple of months later, I think, than the one contended for by the plaintiff originally." (emphasis supplied)

The matter was pursued (R. 18-20):

"Mr. Light: I believe we can stipulate, Your Honor, that computed in the manner and by the method that all such computations have been made *since the memorandum and understanding of 1945* that will be in evidence here that Robert Brooks' retroactive seniority, if he is entitled to retroactive seniority, regardless of where that might be, would be November 3, 1955.

Mr. Mott: That was not as I understood prior to recess.

The Court: Well, all right, then, that is not satisfactory to you?

Mr. Light, Your Honor, if I may, let me be candid on what our position is.

The Court: All right.

Mr. Light: *The custom and practice* of the Railroad Company and the Railroad Brotherhood *in interpreting the agreement of 1945* has been that any retroactive seniority be computed in a manner that will develop the date November 3, 1945, to employees in the same or similar position of employees as Mr. Brooks, such seniority to be assigned and placed on the seniority roster at a point where he entered his training, which was Monroe, Louisiana, in this case;

* * *

The Court: * * * Now, do I understand further, Mr. Light, that it would be the position of the Railroad and the Railroad is prepared to concede that if Mr. Brooks is entitled to this same seniority retroactive provision at North

Little Rock *under the Company's practice,* if it were applied to North Little Rock, the date there would be 11-3-55 also?

Mr. Light: Yes, Your Honor, we will concede and stipulate that if — and certainly that is an 'if' —

The Court: I understand it is.

Mr. Light: If he is entitled to retroactive seniority at North Little Rock the date would be November 3, 1955.

The Court: Now, is that what you are trying to reach?

Mr. Mott: That is agreeable, Your Honor; if he is entitled to it at any place that would be the date." (emphasis supplied)

The stipulation thus formulated was subsequently referred to as representing the date on which Brooks would have completed his apprenticeship had it not been for the military service (R. 28, 34). Taken in context with the entire Record, it is clear that these characterizations did not concede that he, in fact, would have completed the apprenticeship on the stated date or any other date. That date simply represented a calculation of when he would have completed the apprenticeship but for the military interruption *if* he had progressed through it satisfactorily for an interrupted 1040 days, *if* his performance of a correspondence course consisting of two written lessons a month had been satisfactory, and *if* he had demonstrated the proper aptitude in the work (R. 23-25).

It has been respondent's consistent position that the uncertainties relating to progression through, and completion of, the apprenticeship, relating to transfer involving exercise of managerial discretion during the apprenticeship, and relating to employment as a journeyman on completion of the apprenticeship, all operate to take this case out of the automatic progression test established by *McKinney.*

SUMMARY OF ARGUMENT

I

Petitioner's apprenticeship, interrupted by military service required demonstration of aptitude for the work during the period of 1040 days on the job, and satisfactory completion of a correspondence course. Under the collective bargaining agreement, petitioner is entitled to a retroactive seniority date on the roster at Monroe, Louisiana, of November 3, 1955. Had he completed the apprenticeship on that date, he had no contract right to employment as a journeyman by respondent. These circumstances do not constitute automatic progression as a matter of right as those terms are used in the *McKinney* decision to define the rights preserved by the Act.

The Act does not provide a benefit in terms of seniority to the veteran over those workers left behind, but simply keeps him on parity with them. Under it, petitioner was entitled only to restoration without loss of his seniority as an apprentice. He seeks retroactive seniority in a higher position to which his advancement was not automatic, but only probable.

The courts have long recognized that the training, experience and proficiency to be acquired in an apprenticeship is not satisfied by the mere passage of time. It consistently has been held, both before and after *McKinney*, that the Act does not secure retroactive seniority in the higher position when advancement is made at the end of a traditional type apprenticeship which was interrupted by military service. This result follows whether the dual standards contained in Sections 9 (c) (1) and 9 (c) (2) of the Act be considered alternative or cumulative. Under Section 9 (c) (1) an apprentice on furlough or leave of absence would not accrue seniority creditable toward

journeyman's seniority in the event of a later advancement. Under Section 9 (c) (2), if the apprentice is considered to have continued in "such employment" during his military absence he was an apprentice when he left and an apprentice when he is restored. The escalator principle would not protect his seniority in the higher position to which advancement is later made because under the collective bargaining agreements seniority gained in the apprenticeship is not creditable toward seniority as a journeyman when that advancement is made.

McKinney held that those benefits that it is highly probable a veteran would have achieved are not within the protection of the Act, and fixed the standard as one of automatic progression as a matter of right. The test now suggested by petitioner fails to rise even to the level of the rejected high probability standard. Petitioner seeks reversal of *McKinney* and adoption of a preponderance of the probabilities as the test. This is contrary to congressional intent and the prior decisions of this Court.

II

The claim for retroactive seniority by virtue of a transfer at a point other than that where the collective bargaining agreement would assign it presents a somewhat novel question. Petitioner had no right to the transfer from St. Louis to Little Rock. It was accomplished on his request addressed to the discretion of management. It was neither automatic nor based on contract right.

There is no logical reason that the *McKinney* standard should not apply to transfers as well as promotions. The district court's conclusion that the significant factor was the fact

that petitioner did transfer, not whether he did so as a matter of contract right, is contrary to this Court's declaration in *McKinney* that gratuitous benefits conferred by management do not thereby enlarge the veteran's rights. The basic presumption that the veteran would have remained continuously in the employment permitted by the Act does not authorize further presumptions that he would have selected any particular one of the various employment options that might have been available to him if he had, in fact, remained in the civilian employment.

The court of appeals expressly found is unnecessary to pass on whether the automatic standard applies to transfers, but respondent continues in its position that, aside from the other considerations involved in the case, the transfer feature alone is sufficient to take petitioner's claim out of the protection of the Act.

ARGUMENT

I.

THE ACT DOES NOT SECURE RETROACTIVE SENIORITY FOR PETITIONER BECAUSE HIS PROGRESSION THROUGH THE APPRENTICESHIP AND ADVANCEMENT TO JOURNEYMAN WERE NEITHER AUTOMATIC NOR MATTERS OF RIGHT.

The petitioner's employment by respondent, interrupted by military service, was an apprenticeship the successful completion of which required actual on-the-job training for 1040 working days. Also required was satisfactory performance in a correspondence course consisting of two written lessons a month and the demonstration of the proper aptitude in the work (R. 23-25). After his return from military service, he actually completed the apprenticeship on January 23, 1958. He was immediately thereafter employed as a journeyman machinist and assigned a seniority date as such coinciding with the date of completing his apprenticeship. In this suit he seeks a retroactive seniority date to be assigned on the roster at North Little Rock of November 3, 1955, which date is the subject of the stipulation heretofore mentioned.

Had petitioner completed his apprenticeship on November 3, 1955, there was no obligation on the part of respondent under the collective bargaining agreement then in effect between it and the labor organization of which petitioner was a member to employ him as a journeyman (R. 61-63). Under Rule 37(e) as it read at that time, a former apprentice established seniority as a mechanic only if retained in service upon completing the apprenticeship (R. 36, 62). The trial court found that the collective bargaining agreement "* * * appears

to give the railroad some theoretical discretion in the employment of mechanics from the ranks of graduating apprentices, * * *" (R. 78). The court of appeals found on examination of the entire written collective bargaining agreement that "There is no contract rule which compels defendant to employ any particular graduate apprentice as a journeyman upon completion of his apprenticeship." (R. 88). The court of appeals was furnished, by agreement of counsel and at the court's request in the course of oral argument, complete copies of the applicable collective bargaining agreements. The district court had the complete copies before it, but only parts were designated for formal inclusion in the Record (R. 38-38, 60).

However, the district court held that petitioner was entitled to the retroactive seniority date, resting its decision on the evidence that there were some apprentice machinists working in an upgraded position as machinists at the North Little Rock shops in November and December, 1955, (R. 21-22), and testimony that the Railroad Company has recognized that its right to upgrade an apprentice depended on the unavailability of qualified journeymen (R. 49-50). The obligation thus recognized was described as an election between hiring the available journeyman who had just finished his apprenticeship, or loss of the right to retain upgraded apprentices of that craft at that point (R. 52).

The district court considered these facts to constitute a showing that petitioner would have been employed as a machinist at North Little Rock if he had finished his apprenticeship there on November 3, 1955, as a matter of right, and as an advancement in status that would necessarily have occurred simply by virtue of continued employment, as those concepts

are enunciated in *McKinney v. Missouri-Kansas-Texas R. Co.*, 357 U.S. 265. However, while accepting the trial court's findings as to the shortage of machinists at North Little Rock in 1955 and that graduate apprentices were therefore readily employed, the court of appeals held that these findings did not support the conclusion that the apprentice's right to advancement was automatic so as to meet the test of *McKinney* (R. 88).

It is now settled that the benefits protected by the Act are those which would have necessarily come as a matter of right simply by virtue of the expiration of time had the veteran not had his employment interrupted by military service. This Court said in *McKinney*, with reference to the Act:

> "Its very important but limited purpose is to assure that those changes and advancements in status that would necessarily have occurred simply by virtue of continued employment will not be denied the veteran because of his absence in the military service. The statute manifests no purpose to give to the veteran a status that he could not have attained as of right, within the system of his employment, even if he had not been inducted into the Armed Forces but continued in his civilian employment."

While *McKinney* says that the veteran is not to be disadvantaged by serving his country, it is also pointed out that the Act does not envisage overriding managerial discretion with respect to promotion nor does it sanction interfering with the terms of collective bargaining agreements relative to opportunities for advancement.

That the Act was not designed to give the veteran a benefit in terms of seniority over the workers left behind, but was to merely insure that he remained on parity with them in seniority was also made clear in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, in this language:

> "* * * But we would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services. * * * No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provision for restoration without loss of seniority to his old position or to a position of like seniority mean no more."

What did the Act, so construed, entitle petitioner to receive on his return from military service? On the facts alleged in the Complaint, and the terms of of the collective bargaining agreements received in evidence, he was entitled to restoration to his job as an apprentice machinist at Monroe without loss of seniority as such. He was entitled to such pay as his seniority protected by the Act would call for, and was entitled to the same opportunity to complete his apprenticeship as he would have enjoyed if he had remained continuously in the civilian employment. All of these benefits were conferred upon him, and there is no complaint now made as to their sufficiency. These things would have come to him, and the other apprentices alike, automatically under the applicable collective bargaining agreement had he remained continuously in his railroad job.

However, as pointed out by the court of appeals, Brooks seeks more than that here. The reasoning of that Court was simply that completion of the apprenticeship and employment as a journeyman would not have occurred by way of automatic progression as a matter of right if petitioner had remained continuously in his civilian employment. His claim did not meet the *McKinney* standard. These advancements would not necessarily have occurred to petitioner simply by virtue of continued employment. A training period with

mandatory standards as to aptitude and academic proficiency was required. The employer's discretion preserved in the collective bargaining agreement to select journeymen from among graduate apprentices, although liberally exercised in time of shortage, is nonetheless the final test that petitioner and others similarly situated must meet before there is any right to employment as a journeyman or seniority in that capacity. It may be highly probable that petitioner would have made the advancement to journeyman had he remained in the civilian employment, but *McKinney* made it clear that the test was one of automatic progression.

In construing this Act the courts have long recognized that the training, experience and proficiency to be acquired in an apprenticeship is not satisfied simply by the passage of time. Long before *McKinney* it was said in *Spearmon v. Thompson*, 167 F.2d 626 (8 Cir., 1948), cert. den. 335 U.S. 822:

> "If proficiency was really the test, no Act of Congress could supply it and these three appellants would have been helpers when they were inducted and would still be 'helpers' when they were reinstated."

The same view was expressed in *Addison v. Tennessee Coal, Iron & Railroad Co.*, 204 F.2d 340 (5 Cir., 1953), where a machinist who had sustained a military interruption of his apprenticeship sought to have his seniority date as a machinist fixed retroactively to the date when he probably would have completed his apprenticeship but for the military service. Rejecting his argument that the Act provided such a preference, the Court said:

> "* * * thus, where promotion or pay is dependent upon qualifications other than mere length of service, the time of service in the armed forces can not be treated as the equivalent of such qualifications."

After *McKinney* confirmed the correctness of these decisions, the courts of appeals had no difficulty in applying the standards it defined. In *Bassett v. Texas & Pacific Railway Company*, 258 F.2d 819 (5 Cir., 1958), a carman apprentice had sustained a military interruption of his apprenticeship and, upon returning to the railroad employment and completing his apprenticeship, sought a retroactive date on the carman's seniority roster. It appeared, as it does in the case at bar, that the apprentice had no automatic or contractual right to promotion to journeyman status, and even the completion of the apprenticeship was conditioned on performance in a course of work to the satisfaction of certain railway officials. Characterizing the plaintiff's contention to be "* * * that 'without loss of seniority' refers not only to seniority in the vacated position but also to seniority in any position which he probably would have obtained upon constant employment", the Court held that the Act did not confer any such right and made this commentary on *McKinney*:

> "Certainly, the McKinney case clearly decides the question of whether a veteran after re-employment is entitled to a retroactive seniority status upon a subsequent promotion where he had only a high probability of promotion had he not been in the service. Only where the promotion or advancement is automatic can the veteran claim his right."

The Eighth Circuit Court made the same disposition of a similar claim in *Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co.*, 259 F.2d 122 (8 Cir., 1958), where the plaintiff had been a carman's helper at the time of his military induction, and after return to the civilian employment sought an adjusted seniority date on the carman's seniority roster to give him the benefit of the time spent in the military. Again it was found that since he would not have "had an absolute contract right to be automatically promoted", his claim was

outside of the protection of the Act. This observation was made respecting the *McKinney* decision:

> "That case authoritatively put to rest the question of whether returning veterans are entitled to retroactive promotions and seniority rights by holding that, to entitle the veteran to relief, the facts must show that the veteran would have been upgraded automatically, and that a strong probability of advancement will not suffice."

Judge Blackmun ably summarizes the line of demarcation that the cases have drawn on the question of retroactive seniority when advancement is made to a higher position at the end of an apprenticeship type of work period that was interrupted by the military service. In *Tilton, et al v. Missouri Pacific Railroad Company*, 306 F.2d 870, 875 (8 Cir. 1962) he makes these two classifications:

> "(a) Where it is found, or where the parties have stipulated or conceded, that, but for the period of military service, the work period would have been completed by a date certain or in a particular order among the upgraded employees, or, in other words, that the claimant would have been promoted automatically or by reason of mere passage of time, the claimant-veteran is entitled to seniority in his new position retroactively to that earlier date or in that order. (citing cases).
>
> "(b) On the other hand, if the claimant's promotion is not certain (as is the case where comparative ability, physical condition, age, employer's discretion, and the like, are factors) but is only probable — even highly probable — retroactive seniority is withheld."

These court decisions withhold retroactive seniority in the higher position when advancement is made at the end of a traditional apprenticeship program. Thus it might be said that a veteran who was inducted while an apprentice is not restored, as directed by Section 9 (c) (2) of the Act, to "such status in his employment as he would have enjoyed if he had

continued in such employment continuously from the time of his entering the armed forces until the time of his restoration." That is, *if* he had remained continuously in the civilian employment he would have completed part or all of the apprenticeship and would have been this much further along toward journeyman's status. Despite this, he is still required to complete the apprenticeship work period on his return from military service without credit for the military service in the form of accelerating the completion of the apprenticeship or advancing his seniority as a journeyman. However, this treatment is perfectly consistent with the teachings of *McKinney* that the Act does not guarantee a perfect reproduction of what might have been, and that its purpose is to secure only those benefits that would have come automatically and as a matter of right to the veteran.

This treatment also gives effect to the language of Section 9(c)(1) which appears to offer an alternative standard for measuring the rights of restoration conferred by the Act. It is there provided that the returning veteran:

> "* * * shall be considered as having been on furlough or leave of absence during his period of training and service in the armed forces, shall, be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, * * *[1]."

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[1] Petitioner points out in his Brief, p. 35, fn. 19 that during the House debates Representative May identified the chief purpose of this legislation to be preservation of seniority of railroad employees. That the *furlough* concept was related to the peculiar concern for railroad employees is evident from Mr. May's explanation immediately following his statement quoted by petitioner: "In other words, we put them on furlough during the time they are in the service and they will even be permitted to count this time on the question of their retirement." 86 Cong. Rec 11072.

It appears beyond dispute that an employee engaged in a traditional apprenticeship requiring a fixed number of days of training would not satisfy those work requirements while on furlough or leave of absence. On return from such an absence, the uncompleted training would still be a requisite to attaining the proficiency constituting qualification for advancement.

Thus, application of the furlough or leave of absence standard does not permit acceleration of the apprenticeship, and retroactive seniority in the higher position when advancement is made at the end of a traditional apprentice type program. Retroactive seniority is required only when the advancement is automatic as a matter of right as held in *McKinney*. However, apprentices are protected by the Act in the right to restoration *in the apprenticeship program* at the point of departure, with escalator benefits as to wages and collateral benefits, and seniority *within the apprenticeship program*. These they would have had if on furlough or leave of absence. On the other hand, furlough or leave of absence would neither serve to advance them in completion of the apprenticeship, nor produce a retroactive seniority date as a journeyman if advancement to that status was later made.

The result achieved by application of the furlough or leave of absence standard is not inconsistent with the continuous employment standard in Section 9 (c) (2). The statutory mandate expressed there is that the veteran be restored to such a status as he would have had if he had remained continuously "in such employment". Thus an apprentice is restored as an apprentice with such benefits as he would have attained if he had remained an apprentice during the military service. His seniority in "such employment", i.e., the apprenticeship, has been preserved. However, the seniority in a

higher position to which advancement is later made is not preserved simply because the collective bargaining agreements in the Record, applicable to veterans and non-veterans alike (R. 62), provide that seniority gained in the apprenticeship is not creditable toward seniority as a journeyman when that advancement is made.

It would therefore seem that whether the standards provided in Sections 9 (c) (1) and 9 (c) (2) be regarded as alternative[2] or cumulative, the same result is reached respecting apprentices engaged in the traditional type of program.

Considerable space is devoted in petitioner's brief to an effort to distinguish *McKinney* from the case at bar. However, the brief culminates in what appears to be an abandonment of that effort with a plea that *McKinney* be overruled. In his final paragraph of argument (petitioner's brief, p. 36) petitioner asks this Court to hold that a veteran is entitled under the Act to any benefit he can show "(with the certainty generally requisite to establish legal rights)" that he would have attained by virtue of the continued employment.[3] Presumably petitioner's suggested test of certainty has reference to a preponderance of the evidence since that is the customary standard of proof in an ordinary civil case. *McKinney* held that

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[2] This Court has referred to these standards as providing alternative tests of the veteran's right. *Trailmobile Co. v. Whirls*, 331 U.S. 40, 58. His statutory rights were there characterized in this language: "He was to be restored and kept, for a year at least, in the same situation as if he had not gone to war but had remained continuously employed *or* had been 'on furlough or leave of absence.'" (emphasis supplied).

[3] The degree of proof by which a veteran must establish his entitlement to any right conferred by the Act is not here involved. The question presented in this case is the scope of the right that is created by the statute. There seems no reason to doubt that the requisite quantum of evidence by which a veteran must establish any essential disputed fact would be the preponderance of the evidence. However, in defining the scope of the right conferred, this Court said in *McKinney* that only those benefits that would have come automatically and as a matter of right are included.

the Act secured only those benefits that would have come automatically and as a matter of right and specifically rejects the proposition that those benefits which the veteran can show a high probability that he would have attained are also secured. Now petitioner seeks to have the Court to retreat from *McKinney's* rejection of the high probability standard, and to go even further and establish the test as simply a preponderance of the probabilities.

II.

THE ACT DOES NOT SECURE SENIORITY FOR PETITIONER AT NORTH LITTLE ROCK BECAUSE HE HAD NO RIGHT TO TRANSFER THERE NOR WAS HIS MOVE THERE THE RESULT OF ANY FORM OF AUTOMATIC PROGRESSION.

The case at bar presents the conventional facts relating to the non-automatic progression through an apprenticeship and advancement to journeyman status. However, a somewhat novel feature here presented is that by virtue of a transfer from one point of employment to another, the veteran seeks retroactive seniority at a different place than that at which the collective bargaining agreement would assign it. This is significant when testing the petitioner's claim against the standard of the Act because, if seniority on the North Little Rock roster is secured by the Act, it must appear that petitioner not only would have automatically become a machinist on November 3, 1955, if he had remained continuously in the employment, but also that he *automatically* would have made this advancement *at North Little Rock* at that time. This record clearly demonstrates that there was no automatic progression that would have brought petitioner to North Little Rock, nor did he have any contract right to make such a transfer. His own testimony is clear on the point (R. 32):

> Q. What were the circumstances by which you gained your employment at Little Rock or the North Little Rock shop?
>
> A. By request of transfer.
>
> Q. Will you elaborate a little bit more?
>
> A. I asked for a transfer to the North Little Rock shop and it was approved by the master mechanic or shop superintendent, whichever you want to call him, and it was

approved by the master mechanic at North Little Rock and the master mechanic at St. Louis.

The transfer was neither automatic nor based on contract right.

That the *McKinney* standard applies equally to transfer as well as promotion seems to be logically indisputable, and it was so held in *Horton v. United States Steel Corporation*, 286 F.2d 710 (5 Cir., 1961), where the court said:

> "To our statement that 'Only where the promotion or advancement is *automatic* can the veteran claim his right', Bassett v. Texas & Pacific Railway Co., 5 Cir., 1958, 258 F.2d 819, 823, may now be added transfer. There was no automatic assurance that, had he been present he would have been transferred. He had no enforceable right to demand that this be done. It was that which the Act undertook to protect and in the absence of it there is no right to relief. Sularz v. Minneapolis, St. Paul & Sault Ste. Marie R. Co., 8 Cir., 1958, 259 F.2d 122; Poore v. Louisville & Nashville R. Co., 5 Cir., 1956, 235 F.2d 687, 692."

The district court was of the opinion that the significant factor relating to the transfer was the fact that petitioner did transfer to North Little Rock instead of whether he did so as a matter of contract right (R. 79-80). This view is contrary to the principles laid down in all of these cases, and is directly inconsistent with this Court's declaration in *McKinney* that when the employer gives more than is required by the Act or by contract the veteran's rights are not thereby enlarged. As stated at 357 U.S. 273:

> "Respondent asserts that petitioner was in fact assigned to the group 1 position of assistant cashier through a mistake of law. Whatever the reason, the fact of employment in the higher position did not enlarge petitioner's rights under either the collective bargaining agreement or the statute. Since respondent was not obligated to give petitioner the higher position at all, when it did so it was not bound to give him a seniority date earlier than that

to which any employee similarly promoted would have been entitled."

To support the district court's conclusion it is necessary to show that petitioner was on an employment "escalator" which would have automatically carried him to North Little Rock by November 3, 1955, as a matter of contract right. The record does not furnish such support. It is clear that he could not have gone to North Little Rock as a matter of contract right, and the Act no more authorized the presumption that he would have automatically gone there than that he would have automatically gone to Lake Charles, Kansas City, Osawatomie, or any other point on respondent's system.

It would seem that the only presumption afforded by the Act as an aid in reconstructing "what might have been" must be founded on the language of Section 9(c) (2) "* * * if he had continued in such employment continuously from the time of his entering the armed forces until the time of his restoration to such employment." This standard necessarily seems to authorize the basic presumption of continuous employment, and thus avoid defeat of a veteran's claim because of the bare possibilities (as they are characterized at page 34-35 of petitioner's brief) that he would have been discharged due to unsatisfactory work or terminated his employment because of sickness. Similarly, his claim would not be jeopardized by the bare possibility that he would have voluntarily quit his job. However, neither the language of the Act nor the prior decisions of this Court provide a basis for additional presumptions that he would have been beneficiary of exercised managerial discretion or that he would have chosen any particular course respecting employment options that might have been available to him.

The court of appeals expressly found it unnecessary to pass on the question of whether the automatic standard applies to transfers such as here involved because of its conclusion that the judgment should be reversed and dismissed for the reasons heretofore discussed (R. 89). Respondent continues in the position urged in both lower courts that, aside from the other considerations involved in the case, the transfer feature alone operates to take petitioner's claim out of the protection of the Act.

The benefit here sought by petitioner is not an absolute benefit such as the right to re-employment or the right to a certain pay scale. Here he seeks an advantage in his employment relative to, and at the expense of, his fellow workers. Their rights to earned seniority are entitled to as much consideration and protection as the alleged right for which petitioner contends. If this advantage is not really on that the Congress has provided for him in the Act, then awarding it to him would be not only an unearned windfall for petitioner but also would amount to an unjust deprivation of earned rights of his fellow workers. The Congressional scheme was not directed toward making the veteran whole. This Court so observed in *McKinney* (357 U.S. 271):

> "However, 9 (c) does not guarantee the returning serviceman a perfect reproduction of the civilian employment that might have been his if he had not been called to the colors. Much there is that might have flowed from experience, effort, or chance to which he cannot lay claim under the statute. Section 9 (c) does not assure him that the past with all its possibilities of betterment will be recalled."

The loss of probabilities and possibilities is one imposed on all veterans alike. Petitioner has failed to bring his claim out of that class.

CONCLUSION

It is respectfully submitted that the decision of the court of appeals should be affirmed.

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In the Supreme Court of the United States

October Term, 1953

ROBERT C. BROOKS, PETITIONER

v.

MISSOURI PACIFIC RAILROAD COMPANY, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Respondent petitions for hearing or, in the alternative, for clarification of the opinion for the reasons herein stated.

The opinion of the Court disposes of this case on the basis of its decision in *Tilton v. Missouri Pac. R. Co.*, decided the same day. Respondent does not now ask any reconsideration of the *Tilton* decision. Neither is reconsideration sought of the holding that *Tilton* disposes of the questions in this case dealing with the automatic character of the advancement from apprentice to journeyman, and of the legal effect of various uncertainties relating the advancement.

However, there remains an important question that the Court does not purport to resolve in either *Tilton* or this case. That is, whether the point seniority system historically characteristic of the railroad shop crafts is now so emasculated by the requirements of the Universal Military Training and Service

Act that it has ceased to afford the very protection that was its fundamental purpose.

The effect, although perhaps not the intent, of the decision in this case is to permit petitioner to transfer seniority from one point of employment to another. This is a right denied all other employees (Rule 15, R. 61). If petitioner has this right, then the intended protection of the point seniority system has been lost by all employees, veteran and non-veteran alike.

It is undisputed that Brooks was transferred to the North Little Rock shops on July 25, 1955 as a result of the exercise of managerial discretion (R. 32). This discretion was exercised *after* his return from military service, as distinguished from exercise of the managerial discretion involved in *Tilton* prior to the entry of those petitioners into military service. Under the terms of the collective bargaining agreement, petitioner could have brought no seniority with him on transfer (Rule 15, R. 61). The seniority of all employees covered by the agreement was confined to the point and seniority subdivision where they were employed (Rule 25 (a), R. 62).

In operation, the point seniority system permitted a journeyman machinist seeking employment to look at the journeyman's seniority roster at the North Little Rock shops and know exactly who would be ahead of him. He could make a discriminating choice between going on the bottom of that roster, or going on the bottom of the roster at some other point. He would be secure in knowing that once on that roster, no other machinist could ever "jump" him.

This "point" system of seniority is historically characteristic of the railroad shop crafts. (R. 44). It is vitally important

to the employees in this industry of declining employment opportunities (Brief Amicus Curiae, Railway Employees' Department, AFL-CIO, p. 8). In *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, this Court said:

> "Congress recognized in the Act the existence of seniority systems and seniority rights. It sought to preserve the veteran's rights under those systems and to protect him against loss under them by reason of his absence. *There is indeed no suggestion that Congress sought to sweep aside the seniority system.* What it undertook to do was to give the veteran protection within the framework of the seniority system * * *". (emphasis supplied)

If the Act now affords to veterans the right to transfer the retroactive seniority they acquire pursuant its terms, then the devastating effect on the point seniority system is easily demonstrated. A journeyman machinist seeking employment must not only consult the journeyman's seniority roster at any point to determine the relative security it would offer him. He must also study the apprentice rosters at that point and determine whether any are veterans, and then must calculate the amount of retroactive seniority that will probably be credited to those veteran apprentices upon completion of their apprenticeships. There is yet a greater vice. He must consult the apprentice rosters *of every shop on the railroad's system*, because veteran apprentices in those shops may be transferred to the shop under consideration. In that event, retroactive seniority acquired by military absence *from another shop* would enable them to "jump" him on the roster at this point upon completion of their apprenticeship.

The resulting insecurity would penalize veterans and non-veterans alike. For example, a journeyman with five years seniority (including retroactive seniority credited for military

service) at the St. Louis shops could regard a position at the bottom of the roster at the North Little Rock shops to be more advantageous because of the number and age of the journeymen employed there, and the relative prospects of the two shops respecting volume of work. On being employed at North Little Rock, his prior seniority is forfeited (R. 61). Thereafter, one or more veteran apprentices could come to North Little Rock during or following completion of their apprenticeships, and by transferring retroactive seniority acquired elsewhere "jump" him on the journeyman's roster.

Every apprentice who had acquired retroactive seniority as a result of military service could then, upon completion of the apprenticeship, go to any shop on respondent's system where there was an employment opportunity for a journeyman and "jump" two or three years on the roster immediately upon being employed.

That this Court intended no such result appears clear from the clarification of *McKinney v. Missouri Kansas-Texas R. Co.*, 357 U.S. 265 in the *Tilton* opinion. The Court said;

> "Properly read, therefore, *McKinney* holds that where advancement depends on an employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service."

The employer's discretionary choice in the instant case was exercised after return from military service. Of course, the discretion related to transfer instead of advancement, but no rational reason has been advanced that the foregoing test should not be equally applicable to both. The only decision purport-

ing to make a careful analysis of the question held that the same standard applied. *Horton v. United States Steel Corp.*, 286 F.2d 710 (5 Cir., 1961).

The Court of Appeals in the instant case found it unnecessary to pass on the transfer of seniority question because of its conclusion that the case should be reversed and dismissed on other grounds (R. 89). The question was argued to this Court (Respondent's Brief, p. 21 - 24; Petitioner's Brief, p. 29 - 30), however it is not resolved in the opinions in this case or *Tilton*. Fully aware that Petitions for Rehearing are rarely granted, respondent submits that the same grounds exist for granting such relief that prompted the Court to act in *Silver King Coalition Mines v. Conkling Mining Co.*, 256 U.S. 18, 25. There, rehearing was granted to "* * * decide the questions argued but left open by us."

Respondent respectfully submits that rehearing should be granted on the question of whether the Universal Military Training and Service Act confers upon veterans the right to transfer seniority within a point seniority system where the collective bargaining agreement specifically denies that right to all employees. In the alternative, respondent submits that the opinion of the Court should be clarified to reflect that it is without prejudice to the authority of the Court of Appeals, in proceedings on this Court's Mandate, to pass on this question that it expressly found unnecessary to decide on the original appeal.

Respectfully submitted,

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CERTIFICATE

I, Robert V. Light, certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

ROBERT V. LIGHT